Judge Davis 1-496
Submitted
Dec 14-75

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 546.

FREDERICK J. MAYER AND SETH EVANS, ASSIGNEES, UNDER THE ASSIGNMENT LAWS OF THE STATE OF OHIO, OF GEORGE BOGEN AND JACOB BOGEN, AS INDIVIDUALS AND AS LATE PARTNERS, AS G. & J. BOGEN, AND OF GEORGE BOGEN, JACOB BOGEN, AND HENRY MÜLLER, AS INDIVIDUALS AND AS LATE PARTNERS, AS GEORGE BOGEN & SON, PLAINTIFFS IN ERROR,

vs.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF GEORGE BOGEN AND JACOB BOGEN, AS INDIVIDUALS AND AS LATE PARTNERS, AS G. & J. BOGEN, BANKRUPTS, AND OF GEORGE BOGEN, JACOB BOGEN, AND HENRY MÜLLER, AS INDIVIDUALS AND AS LATE PARTNERS, AS GEORGE BOGEN & SON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JULY 10, 1875.

R. Field

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No. 546.

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VS.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF GEORGE BOGEN AND JACOB BOGEN, AS INDIVIDUALS AND AS LATE PARTNERS, AS G. & J. BOGEN, BANKRUPTS, AND OF GEORGE BOGEN, JACOB BOGEN, AND HENRY MÜLLER, AS INDIVIDUALS AND AS LATE PARTNERS, AS GEORGE BOGEN & SON.

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1 At a stated term of the circuit court of the United States for the sixth judicial circuit and southern district of Ohio, begun and held at the court-house in the city of Cincinnati on the first Tuesday in April, being the sixth day of that month, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States of America the ninety-ninth. Present, the honorable Philip B. Swing, one of the judges of said court.

Among the proceedings had were the following, to wit:

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, bankrupts, and George Bogen, Jacob Bogen and Henry Müller as individuals and as late partners as George Bogen and Son, bankrupts, *vs.* FREDERICK J. MAYER AND SETH EVANS, assignees, under the assignment laws of the State of Ohio, of said George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, and of George Bogen, Jacob Bogen, and Henry Müller, as individuals and as late partners as George Bogen & Son.	2063. Petition.

2 Be it remembered that heretofore, to wit, on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and seventy-four, came the said plaintiff, by his attorneys, Long, Kramer & Kramer, and filed in the clerk's office of the court aforesaid his certain petition and affidavit herein, which said petition and affidavit are in the words and figures following, to wit:

Petition & affidavit.

Circuit court of the United States, southern district of Ohio.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, bankrupts, and of George Bogen, Jacob Bogen, and Henry Müller as individuals and as late partners as George Bogen & Son, bankrupts,

vs.

FREDERICK J. MAYER AND SETH EVANS, assignees, under the assignment laws of the State of Ohio, of said George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, and of George Bogen, Jacob Bogen and Henry Müller, as individuals and as late partners as George Bogen and Son.

Plaintiff states that he, as the duly appointed and qualified assignee in bankruptcy of said bankrupts, is the owner of, and entitled to the immediate possession oft, he following-described goods, chattels, and personal property, to wit: Five hundred (500) cases of sparkling wine,

quart and pint bottles; seven thousand (7,000) gallons of still catawba wine; a very large lot of large and small wine and vinegar casks; two set of machines for finishing sparkling wines; twelve standards for manufacturing vinegar; one safe and a lot of office-furniture; two copper stills and fixtures complete; also a large amount of personal property, consisting of wines, vinegar, casks, barrels, fixtures, apparatus, machinery, and all property contained in the certain building known as No. 468 Vine street, in the city of Cincinnati, Hamilton County, Ohio, and in the cellars thereof. Also all the books of account of said bankrupts and each of them, consisting of ledgers, sale-books, journals, day-books, cash-books, bank-books, check-books, and other books of accounts, and all papers, deeds, title-papers, and other writings of said bankrupts, and in which their accounts and business transactions are contained; also a large number of promissory notes, bills, drafts, etc., payable to the estate of said bankrupts; also thirty-five thousand (35,000) dollars, in cash money, or thereabouts, all of which belongs to and is the property of the plaintiff as said assignee, besides other personal property in the possession of said defendants in said building, No. 468 Vine street, Cincinnati, and elsewhere in said city of Cincinnati. Plaintiff states that all of said goods, and chattels, and personal property are wrongfully detained by said defendants, and unlawfully detained by them, and each of them, from the possession of the plaintiff, and the said defendants, and each of them, so wrongfully and unlawfully detained the same as aforesaid for the period of over two weeks, to plaintiff's damage in the sum of ten thousand ($10,000) dollars.

Wherefore the said plaintiff prays for judgment against the said defendants, and each of them, that they, the said defendants, and each of them, do deliver and return to the said plaintiff all the said goods, and chattels, and personal property, moneys, etc., as aforesaid, so unlawfully detained, and for said sum of $10,000.00, his damages, so as aforesaid sustained by reason of said unlawfully detention, and plaintiff prays for all further and proper relief in the premises to which he may be entitled.

MAX HELLMAN,
Assignee in Bankruptcy of said Bankrupts,
By LONG, KRAMER & KRAMER,
His Attorneys.

UNITED STATES OF AMERICA,
Circuit Court of the United States,
Southern District of Ohio, ss:

Max Hellman, assignee in bankruptcy of the above-mentioned bankrupt, being duly sworn, on oath says that the facts stated in the foregoing petition are true, as he verily believes.

MAX HELLMAN.

Sworn to before me, and subscribed in my presence, by the said Max Hellman, assignee of said bankrupts, this 24th day of September, 1874.

THOMAS AMBROSE, *Clerk.*

To the clerk of the circuit court of the United States, southern district of Ohio.

Issue summons, and order of delivery, and writ of replevin in the above-entitled cause, as above; action for the recovery of specific per-

sonal property, and $10,000.00 damages, for unlawful and wrongful detention thereof.

LONG, KRAMER & KRAMER,
Attys. for Max Hellman, Assignee in Bankruptcy of the above-named Bankrupts.

Circuit court of the United States, southern district of Ohio.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, bankrupts, and of George Bogen and Jacob Bogen, Henry Müller, as individuals and as late partners as George Bogen & Son, bankrupts,

vs.

FREDERICK J. MAYER AND SETH EVANS, assignees, under assignment laws of the State of Ohio, of said George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, and of George Bogen, Jacob Bogen, Henry Müller, as individuals and as late partners as George Bogen & Son.

Affidavit.

UNITED STATES OF AMERICA,
Circuit Court of the United States, Southern District of Ohio, ss:

Max Hellman, assignee in bankruptcy of the above-named bankrupts, and plaintiff in the above-entitled suit, being first duly sworn, upon oath deposes says, that he is the owner of and entitled to the immediate possession of the following described goods and chattles, and personal property, to wit:

Five hundred (500) cases sparkling wine, quart and pint bottles, seven thousand (7,000) gallons of still catawba wine, and a very large lot of small and large wine, and vinegar-casks, two setts of machines for finishing sparkling wines, twelve standards for manufacturing vinegar, one safe and a lot of office furniture, two copper-stills and fixtures complete, also a large amount of personal property, consisting of wines, vinegar-casks, barrels, fixtures, apparatus machinery, and all properly contained in the certain building known as No. 468 Vine street, in the city of Cincinnati, Hamilton County, Ohio, and in the cellars thereof; also, all the books of account of said bankrupts, and each of them, consisting of ledgers, sales-books, journals, day-books, cash-books, bank-books, check-books, and other books of accounts, and all papers, deeds, title-papers, and other writings of said bankrupts, and in which their accounts and business transactions are contained, also a large number of promissory notes, bills, drafts, etc., payable to the estates of said bankrupts, also thirty-five thousand ($35,000.00) dollars in cash money, or thereabouts, all of which belongs to, and is the property of the plaintiff as said assignee, besides other personal property in the possession of said defendants in said building No. 468 Vine street, Cincinnati, and elsewhere in said city of Cincinnati.

Affiant says that all of said goods and chattels, personal property, moneys, &c., are wrongfully and unlawfully detained by the defendants and each of them.

Affiant further says, that said goods, chattels, personal property, moneys, and other personal property, or any part thereof, were not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine, or amercement asssessed against him, or by virtue of any order of delivery issued, or upon any process of any kind whatever, or any other mesne or final process issued against said plaintiff.

MAX HELLMAN.

Sworn to before me, and subscribed to in my presence, by the said Max Hellman, assignee of said bankrupts, this 24' day of September, 1874.

THOMAS AMBROSE, *Clk.*

On which said petition was the following endorsement:

Security for costs.

I am security for costs in this case.

MARCUS FECHHEIMER.

And afterwards, to wit, but on the same day and year last aforesaid, there was issued out of the clerk's office of said court a certain writ of summons ad respondendum, which said summons is in the words and figures following, to wit:

Summons.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

7 The President of the United States of America to the marshal of the southern district of Ohio, greeting:

You are hereby commanded to summon Frederick J. Mayer and Seth Evans, assignees, under the assignment laws of the State of Ohio, of said George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, and of George Bogen, Jacob Bogen, & Henry Müller as individuals and as late partners as George Bogen & Son, citizen' of and resident in the State of Ohio, if they be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Cincinnati, on the 4 Tuesday in the month of October, 1874, to answer unto Max Hellman, assignee in bankruptcy of George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, bankrupts, and George Bogen, Jacob Bogen, and Henry Müller as individuals and as late partners as George Bogen & Son, bankrupts, citizens of and resident in the State of Ohio, in an action for the recovery of specific personal property, $10,000 damages; and have you there this writ on the 2 Tuesday Oct.

Witness the Honorable M. R. Waite, Chief-Justice of the United States, this 24th day of September, A. D. 1874, and in the 99th year of the Independence of the United States of America.

THOS. AMBROSE, *Clerk.* [SEAL.]

And on which said writ is the following endorsement:

8 Cause of action & security. Marcus Fechheimer, security for costs. Action for the recovery of specific personal property and $10,000 damages for unlawful and wrongful detention thereof.

And afterwards, to wit, but on the same day and year last aforesaid, there was issued out of the clerk's office of the court aforesaid a certain order of delivery herein, which said order of delivery is in the words and figures following, to wit:

Order of delivery.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

The President of the United States of America to the marshal of the southern district of Ohio, greeting:

Whereas Max Hellman, assignee in bankruptcy of George and Jacob Bogen as individuals and as late partners as G. and J. Bogen, and of George and Jacob Bogen and Henry Müller as individuals and as late partners as George Bogen and Son, bankrupts, against Frederick J. Mayer and Seth Evans, assignees under the assignment law of the State of Ohio, of said George Bogen and others, has commenced a civil action in the circuit court of the United States for the southern district of Ohio, for the recovery of the following specific personal property, to wit: 500 cases sparkling wine, quart and pint bottles; 7,000 gallons of still catawba wine; a very large lot of large and small wine and vinegar-casks; 2 sets of machines for finishing sparkling wines; 12 standards for manufacturing vinegar; 1 safe and a lot of office furniture; 2 copper stills and fixtures complete; also, a large amount of personal property, consisting of wines, vinegar, casks, barrels, fixtures, apparatus, ma-
9 chinery, and all property contained in the certain building known as No. 468 Vine street, Cincinnati, Ohio, and in the cellars thereof; also, all the books of account of said bankrupts, and of each of them, consisting of ledgers, sales-books, journals, day-books, cash-books, bank-books, check-books, and other books of account, and all papers, deeds, title-papers, and other writings of said bankrupts, and in which their accounts and business transactions are contained: also, a large number of promissory notes, bills, drafts, &c., payable to the estates of said bankrupts; also, ($35,000) thirty-five thousand dollars in cash money or thereabouts, and has filed his affidavit in the clerk's office of said court in order to obtain an order for the immediate delivery of the said goods and chattels: This, therefore, is to command you, as such marshal, to take the said goods and chattels above described, and deliver the same to the said Max Hellman, assignee, plaintiff in said action. And of this order and your proceeding thereon make due return on the second Tuesday of October, A. D. 1874.

Witness the Honorable M. R. Waite, Chief-Justice of the United States, this 24 day of September, A. D. 1874, and in the 99 year of American Independence.

[SEAL.] Attest: THOMAS AMBROSE,
Clerk U. S. Cir. Ct.

And afterwards, to wit, on the twenty-eighth day of September, in the year last aforesaid, came the marshal to whom said writ of summons ad respondendum was in form aforesaid directed, and returned the
10 same into the clerk's office of the court aforesaid, with his doings endorsed thereon, in the words and figures following, to wit:

Marshal's return on summons.

I rec'd this writ at Cinc'ti, O., at 4.30 p. m. on 24 day September, A.

D. 1874, and served true copy hereof as follows: Personally on Seth Evans, at 10.15 a. m. on 25 Sept., 1874; at residence on Fred'k J. Mayer, at 6.40 p. m. on 25 Sept., 1874.

W. R. THRALL,
U. S. Marshal,
By J. KIFFER, *Deputy.*

And afterwards, to wit, but on the same day and year last aforesaid, came the marshal to whom said order of delivery was in form directed, and returned the same into the clerk's office of the court aforesaid, with his doings thereunder endorsed thereon in the words and figures following, to wit:

Marshal's return on order of delivery.

I recd. this writ at Cin'ti, O., at 4.30 p. m. on 24 day Sept., 1874, and served true copy hereof personally on the within-named Seth Evans, at 10.15 a. m. on 25 Sept., 1874; and at residence on Frederick J. Mayer, at 6.40 p. m. on 25 Sept., 1874.

W. R. THRALL,
U. S. Marshal,
By J. KIFFER, *Deputy.*

CINC'TI, OHIO, *Sept.* 26, 1874.

Pursuant to the command of the within order, and at 4.30 p. m. on 25 day Sept., 1874, *and* seized and took into my custody and possession the goods and chattels herein named, as will further appear by inventory hereunto attached and made part hereof, except the within-
11 named sum of $35,000.00, which said sum I was unable to find, and have caused said goods and chattels to be valued upon the oaths of Louis Hoffman, Jno. Becker, and A. Weizenecker, three responsible and disinterested freeholders, resident of Ham. Co., O., whose valuation in writing is herewith returned and made part hereof; and at 4 p. m. on 26 Sept., 1874, I delivered all the goods and chattels by me taken to the said Max. Hellman, plaintiff, and have taken the undertaking of said plff., with Joseph Trounstine and Marcus Fechheimer, sureties of the said plff., in sum of thirty thousand dollars, which undertaking is herewith returned and made part hereof.

W. R. THRALL,
U. S. Marshal,
By A. J. GARDNER, *Dep.*

Appraisement.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Whereas by virtue of a certain order of delivery issued from the sixth circuit court of the United States for the southern district of Ohio, wherein Max. Hellman, assignee, is plaintiff, and Frederick J. Mayer and Seth Evans are defendant, returnable to the of next, we, John Becker, Louis Hoffman, and A. Weizeneicker, freeholders of the State of Ohio, having been summoned by W. R. Thrall, marshal of the United States for said southern district, as an inquest to appraise and estimate the real value in money of the following-described goods and chattels, located in and about premises No. 468 Vine st., Cincinnati, Ohio, we having been first duly sworn by said W. R. Thrall, U. S. mar-

shal, by A. J. Gardner, deputy, do, upon actual view of the
12 premises aforesaid, appraise the same at twelve thousand eight hundred and sixty-five $\frac{04}{100}$ dolls.

In testimony whereof we have hereunto set our hands and seals this 25 day of September, 1874.

LOUIS HOFFMAN. [SEAL.]
JOHN BECKER. [SEAL.]
A. WEIZENECKER. [SEAL.]

I do hereby certify that the above appraisers, to wit, Louis Hoffman, John Becker, and C. Weizenecker, were freeholders of the county of Hamilton and State of Ohio, and that they were duly summoned and sworn by me on this 25th day of September, A. D. 1874, and on the same day they returned to me the foregoing appraisement.

W. R. THRALL,
U. S. Marshal,
By A. J. GARDNER, *Deputy.*

Articles appraised.

In safe in office claimed by Louis Pfeiffer.	One hundred and fifty dollars cash money	150
	One draft by Henry Verhage fav. assignees, (Evans, Hellman & Mayer,) on German-Am. Bank	53 76
	One p'ck'ge money of G. & J. Bogen estate	25 60
	" " " Geo. Bogen estate	50 00
	One prom. note of Freiberg & Rheinstonn at 60 days, from Sept. 25, '74, payable to order of Evans, Hellman & Mayer, for	315
	Nine prom. notes unpaid and uncollected, now past due and held, am't'g to 1,427.37, (doubtful.)	
	One certif. of contract of Jacob Gottleib, (do.)	
	Ledger, journal, day-book, cash-book of G. Bogen & Son, 1874, (not ascertained.)	
	Ledger & journal of Geo. Bogen, 1873 & '74	
	13 Appraisement of Geo. Bogen & Son	
	" " G. & J. Bogen	
	" " Geo. & Jacob Bogen	
	Account-book of Geo. Bogen, (not ascertained.)	
	" " " Geo. Bogen & Son, do.	
	Bank & collection book of Evans, Hellman & Mayer, do.	
	One letter-press	$10
	One standing-desk	8
	One corresponding desk with case and papers	3
	One pine book-cupboard or case	2
	One stool and six wood-bottom chairs	2
	One order-book of G. B. & Son	
	One led. and one journal of G. & J. Bogen	
	Three ledgers and one journal of Geo. Bogen & Son	
	One ledger & journal of G. & J. Bogen	
End of office.	One ledger, one journal, & one day-book of G. & J. Bogen	

2ND CELLAR.

260 bottles	unfin. spark. wine, pints, 10 c	26
85 "	" " " " " 10 c	8 50
50 "	" " " qts., 20 c	10
500 "	unfin. red & white wine, pints, 10 c	50

| | | |

ON OUTSIDE SAFE.

One fire-proof safe		40 00
One ledger Geo. Bogen, (1869)		
One check-book & tax-bills		
One a/c book G. & J. Bogen		
One p'ck'ge papers, claims against estate		
(474) four hundred and seventy-four boxes, @ $7 pr. case, sparkling wine, qts. & pints., (white & red)		3,318 00
One bbl. vinegar, partly full, with two measures		4 00
Four shelves, fixtures, (fixtures not appraised.)		
One b'dle filtering-paper		1 50
Two skid & slide board		2 00
Seven hundred and twenty pints wine sold, but not delivered		0 00
16 Six hundred and thirty bot. wine, pints, 4$ pr. doz		210 00
Twenty-eight empty boxes, ea. 20c		5 60
One corking-machine		20 00
One sealing-wax pot & tube (rubber) & gas-stove		75
One lot stencils, (worthless.)		
One water-stand, (fixture not appraised.)		
One closing-machine		20 00
One bottling-machine and stand		10 00
One corking-machine		25 00
One hooking-machine		15 00
One bottling-table, with measures		2 00
Four hundred & seven red sparkling wine, 30c. pr. bot., pints		122 10
One lot faucets & mallets		5 00
One closet with tools, (fixtures not appraised.)		

1ST CELLAR.

One large empty cask, 1,310 gls., 2.50 pr. gall		32 70
One hose		5 00
bbl. settlings		4 00
		518 61
Lot empty bbls. and casks, (bad)		8 00
20 sparkling lables		40 00
75 empty boxes, 20c		15 00
40 bbls. wine vinegar, 6.00 pr. bbl		240 00
7 baskets empty bottles, qts. & pints		3 00
1 grindstone		2 00
2 empty casks		1 20
6 empty bbls., 60c		3 60
17 1 hose, (rubber)		1 00
1 lot hoop-iron		1 00
5 empty casks, 1,104 gls. 1,216 gls. 1,224 " 1,224 " 1,273		
6,041, @ 2½c. pr. gl		211 02
6 wine-buckets, 3 tunnells, and one keg		8 00
1 corking-machine		15 00

1 do. do		20 00
1 hooking do		10 00
1 lot pint-bottles, empty		12 00
1 lot old corks, 1 lot old baskets		5 00
1 cork-puller		1 50
1 cider-press		3 00
1 cask vinegar, guaged 524 gls., 15c. pr. gall		78 60
1 cask wine, cask empty, 1,272 gls., @ 2½c		31 80
1 cask " " " 500 " @ 2½c		12 50
1 wire-machine		5 00
1 lot cask-lumber		10 00
1 lot fermenters and bottles		2 00
	9,924	91
One cask, 1,258 galls., cont'g vinegar, @ 15c. pr. gall	188	70
One cask, (872) " " 700 galls. vinegar, @ 15 pr. gall	105	00
One cask, (160) " " 100 " " @ 15 "	15	00
One cask " " 60 " " @ 15 "	9	00
18 One cask (160) cont'g settlings, 2½c. pr. gall	4	00
Nine casks, empty, in bad order	27	00
Two tubs & carpenter's bench	4	00
One rubber, 25 feet	0	75
One ladder	0	10
Two empty bbls	1	00
One clock	1	00
Two baskets	0	25
One stove	5	00
One copper kettle & furnace	5	00
Two copper stills & fixtures	500	00
Two empty wine-casks, (sold & not appraised.)		
	10,790	71
One three-story brick house, No. 466 & 468 Vine st., with all appurtenances		
One four-story brick building on Hey & Boot alley, as vinegar factory		
One (part) dwelling, stable & still-room		
Rec'd by mail Sept. 26, 1874, and opened by Dep. Gardner, and here of record:		
Sight-dft. by T. L. Ketchann, ass. cash. Indiana Banking of Indianapolis, to order J. C. Brinkmyer & Co., and by them endorsed to order of Evans, Hellman & Mayer, No. 9,471, on First Nat'l Bank, Cinc'ti, O	112	50
19 Found in custody of Second National Bank one prom. note, dated Cin'ti, O., Aug. 26, '74, at 90 days, to order of Evans, Hellman & Mayer, assignees, by G. H. Muller, for	579	25
One prom. note, dated Cin., Aug. 18, '74, at 90 days, to same order, by J. & A. Frieberg	509	95
One prom. note, dated Cinc'ti, Aug. 22, '74, at 60 days, to same order, by P. W. Stanhope	113	26
One prom. note, dated Cin'ti, Aug. 19, '74, at sixty days, to same order, by P. W. Stanhope	175	00
One prom. note, dated Cin'ti, July 16, '74, ninety days, to same order, by P. W. Stanhope	584	37
	12,865	04

We hereby certify to additional appraisement of dft. and notes this day added to amt. of face-value, to wit, two thousand seventy-four $\frac{33}{100}$ dolls.

JOHN BAKER.
LOUIS HOFFMANN.
A. WEIZENECKER.

Undertaking.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

Whereas Max Hellman, assignee of George Bogen and others, has caused an order of delivery for the following good' and chattels:

20 Four hundred and fifty dollars cash money.
Sight-dft. of Henry Verhage in fav. Evans, Hellman & Mayer, for $53.76.
One p'ck'ge cash money of G. &. J. Bogen's estate, of twenty-five $\frac{60}{100}$ dolls.
One do do Geo. Bogen's estate of fifty dolls.
One prom. note of Freiberg & Rheinstorm, for three hundred and fifteen dolls.
Nine prom. notes, past due & uncollected, amtg. to 1,427.37.
One certif. of contract of Jacob Gottleib.
Ledger, journal, day-book, cash-book of Geo. Bogen & Son, 1874.
Ledger & journal of Geo. Bogen, 1873 & 1874.
Appraisement-book of Geo. Bogen & Son.
" " G. & J. Bogen.
" " Geo. & Jacob Bogen.
Account-book of Geo. Bogen, and account-book of Geo. Bogen & Son.
Bank & collection book of Evans, Hellman & Mayer.
One letter-press, one standing desk, one corresp'y desk with papers.
One case or cupboard containing books, one stool & six chairs.
One order-book of G. Bogen & Son; one ledger & one journal of G. & J. Bogen.
Three ledgers and one journal of Geo. Bogen & Son.
One ledger and one journal of G. & J. Bogen.
One ledger, one journal, and one day-book of G. & J. Bogen.
One fire-proof safe; one ledger of Geo. Bogen, 1869; one check-book, tax-bills, etc.
One a/c book, G. & J. Bogen; one p'ck'ge papers, claims against the estates.
474 cases spark. wines, qts. & pints; one bbl. vinegar, (partly full,) with two measures; four shelves; one bale filt'g paper; two skids
21 and one sideboard; 720 bot. wine, qts.; 630 bots. wine, pints; 28 empty boxes; one corking-machine; one wax-pot & gas-stove; one lot stencils; one dosing-machines; one bottling-machine; one cork-machine; one hooking-machine; one bottling table, with measures; 407 bot. red spark. wine, pts.; one lot faucets and mallets.
260 botls. unspark. wine, pts.; one bbl. settlings.
85 do. do. do. pts.; one box contg. qts. sour wine.
50 do. do. do. qts.; 300 bot's unspark. wine, pints.
500 do. do. do. pts.; 600 " " "
1,000 do. do. do. pts.
One cask 465 galls. cont'g 400 galls catawba wine, est.
" " 1,242 " " 1,200 " " "

"	"	1,360	"	"	1,250	"	"	"
"	"	1,100	"	"	1,000	"	"	"
"	"	1,100	"	"	1,000	"	"	"
"	"	1,218	"	empty; one cask 1,272 galls., empty.				
"	"	80	"	empty; one cask 160 galls., empty.				
"	"	160	"	cont'g 150 galls. catawba wine, est.				
"	"	180	"	"	160	"	"	"
"	"	275	"	"	260	"	"	"
"	"	200	"	"	190	"	"	"
"	"	550	"	"	500	"	"	"
"	"	150	"	"	140	"	"	"
"	"	160	"	"	160	"	settling	"
"	"	160	"	"	150	"	catawba wine	"
"	"	160	"	"	150	"	"	"
"	"	settlings, 150 galls.						
"	bbl.	"	15 galls.					

22 One cask settlings, 150 galls.

One lot cask layers or rests, one ladder, two bbls. settlings; One cask syrup, 20 galls.

222 bots. unspark. wine, pints; 500 bots. unspark wine, pints.

2,190	"	"	"	"	;	500	"	"	"	qts.
405	"	"	p. & q.,	"	;	405	"	"	"	p. & q.
330	"	"	p. & q.,	"	;	930	"	"	"	qts.

One bl. Delaware wine; one cask syrup, 25 or 30 gls.; one hlf. bbl. col. spirits, six emp. hlf. bbls, 6 empty kegs, one cask, one small tub, two bbls, one empty cask, 1,310 galls.; one hose, one bbl. settlings, lot empty bbls. & casks, twenty wine-tables, 75 empty boxes, forty bbls. wine vinegar, one grind stone, seven baskets empty botls., two empty casks, six empty bbls., one hose, one lot hoop-iron, five empty casks, six wine-buckets, three funnels, and one keg; two corking-machines, one hooking-machine, one lot pint-bottles, one lot old corks, one lot old baskets, one cork-puller, one cider-press, one cask vinegar, two cask' empty, one wire-machine, one lot lumber, one lot fermenters and bottles, four casks vinegar, one cask settlings, nine empty casks, two tubs and carpenter's bench, one rubber-hose, one ladder, one clock, two empty bbls., two baskets, one stove, one copper kettle and furnace, two copper stills and fixtures, two empty wine-casks, one sght. dft. of J. C. Brinkmeyer & Co. for Evans, Hellman & Mayer for 112.50.

One prom. note of G. H. Muller for Evans, Hellman & Mayer, for			579.25
One prom. note of J. & A. Freiberg,	"	"	509.95
One prom. note of P. W. Stanhope,	"	"	113.26
One prom. note of P. W. Stanhope,	"	"	175.00
One prom. note of P. W. Stanhope,	"	"	584.37

to be issued out of the circuit court of the United States for the southern district of Ohio, in an action now pending in said court, wherein
23 the said Max Hellman, assignee, is plaintiff, and Frederick J. Meyer and Seth Evans are defendants; and whereas said order was delivered to W. R. Thrall, U. S. marshal for southern district of Ohio, and the said marshal has taken said goods and chattels, and the same have been valued by three responsible persons under oath at the sum of twelve thousand eight hundred and sixty-five $\frac{04}{100}$ dollars.

Now, therefore, we, Max Hellman, plaintiff, &c., and Joseph Trounstine and Marcus Feckheimer, undertake to the said Frederick J. Meyer and Seth Evans, defendants in said action, in the penal sum of thirty thousand ($30,000.00) dollars, that the said Max Hellman, assignee, shall

duly prosecute his action as aforesaid, and pay all costs and damages which may be awarded against him.

Cincinnati, O., Sept. 26, 1874.

MAX HELLMAN.
JOSEPH TROUNSTINE.
MARCUS FECKHEIMER.

Witness:
A. J. GARDNER.

Signed in my presence and approved by me this 26th day of September, A. D. 1874, at Cin'ti.

W. R. THRALL,
U. S. Marshal,
By A. J. GARDNER,
Deputy.

And afterwards, to wit, on the twenty-second day of October, in the year last aforesaid came the said defendants, by their attorneys, Caldwell, Coppock and Caldwell, and filed in the clerk's office of said
24 court their answer herein in the words and figures following, to wit:

Answer.

United States circuit court, southern district of Ohio.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen and others, plaintiff,
vs.
FREDERICK J. MAYER AND SETH EVANS, assignees under the assignment laws of Ohio of said George Bogen et al., defendants.
} Answer.

And now come said defendants, Frederick J. Mayer and Seth Evans, assignees, &c., and for answer to the petition of said plaintiff, state to the court:

First. That they deny that said plaintiff, as assignee in bankruptcy of said George Bogen and others, bankrupts, was at the commencement of this action, or now is, the owner of or entitled to the immediate possession of the goods and chattels in the petition mentioned or any part of them. And they deny that they, or either of them, unlawfully detained said property or any part of it from said plaintiff as in said petition stated or otherwise, or that said plaintiff was or is damaged in the sum of ten thousand dollars, or in any other sum whatever.

Second. And said defendants further state to the court that on the 3d day of December, 1873, at Cincinnati, in the county of Hamilton, and State of Ohio, said George Bogen and Jacob Bogen, individually and as partners under the firm-name of G. & J. Bogen, and said George Bogen, Jacob Bogen, and Henry Müller, individually and as partners under the firm-name of George Bogen and Sons, by deed of that date duly executed, conveyed, transferred, and assigned to Frederick J. Mayer,
25 Seth Evans, and Florence Marmet, in trust for the equal and common benefit of all the creditors of said assignors, (among other property,) the goods and chattels in the petition herein mentioned; that said deed was, on said 3d day of December, 1873, duly delivered by the said grantors above named to said assignees therein named, and said assign-

" " 1,360 " " 1,250 " " "
" " 1,100 " " 1,000 " " "
" " 1,100 " " 1,000 " " "
" " 1,218 " empty; one cask 1,272 galls., empty.
" " 80 " empty; one cask 160 galls., empty.
" " 160 " cont'g 150 galls. catawba wine, est.
" " 180 " " 160 " " "
" " 275 " " 260 " " "
" " 200 " " 190 " " "
" " 550 " " 500 " " "
" " 150 " " 140 " " "
" " 160 " " 160 " settling "
" " 160 " " 150 " catawba wine "
" " 160 " " 150 " " "
" " settlings, 150 galls.
" bbl. " 15 galls.

22 One cask settlings, 150 galls.

One lot cask layers or rests, one ladder, two bbls. settlings; One cask syrup, 20 galls.

222 bots. unspark. wine, pints; 500 bots. unspark wine, pints.
2,190 " " " " ; 500 " " " qts.
405 " " p. & q., " ; 405 " " " p. & q.
330 " " p. & q., " ; 930 " " " qts.

One bl. Delaware wine; one cask syrup, 25 or 30 gls.; one hlf. bbl. col. spirits, six emp. hlf. bbls, 6 empty kegs, one cask, one small tub, two bbls, one empty cask, 1,310 galls.; one hose, one bbl. settlings, lot empty bbls. & casks, twenty wine-tables, 75 empty boxes, forty bbls. wine vinegar, one grind stone, seven baskets empty botls., two empty casks, six empty bbls.. one hose, one lot hoop-iron, five empty casks, six wine-buckets, three funnels, and one keg; two corking-machines, one hooking-machine, one lot pint-bottles, one lot old corks, one lot old baskets, one cork-puller, one cider-press, one cask vinegar, two cask' empty, one wire-machine, one lot lumber, one lot fermenters and bottles, four casks vinegar, one cask settlings, nine empty casks, two tubs and carpenter's bench, one rubber-hose, one ladder, one clock, two empty bbls., two baskets, one stove, one copper kettle and furnace, two copper stills and fixtures, two empty wine-casks, one sght. dft. of J. C. Brinkmeyer & Co. for Evans, Hellman & Mayer for 112.50.

One prom. note of G. H. Muller for Evans, Hellman & Mayer, for 579.25
One prom. note of J. & A. Freiberg, " " " 509.95
One prom. note of P. W. Stanhope, " " " 113.26
One prom. note of P. W. Stanhope, " " " 175.00
One prom. note of P. W. Stanhope, " " " 584.37

to be issued out of the circuit court of the United States for the southern district of Ohio, in an action now pending in said court, wherein
23 the said Max Hellman, assignee, is plaintiff, and Frederick J. Meyer and Seth Evans are defendants; and whereas said order was delivered to W. R. Thrall, U. S. marshal for southern district of Ohio, and the said marshal has taken said goods and chattels, and the same have been valued by three responsible persons under oath at the sum of twelve thousand eight hundred and sixty-five $\frac{04}{100}$ dollars.

Now, therefore, we, Max Hellman, plaintiff, &c., and Joseph Trounstine and Marcus Feckheimer, undertake to the said Frederick J. Meyer and Seth Evans, defendants in said action, in the penal sum of thirty thousand ($30,000.00) dollars, that the said Max Hellman, assignee, shall

duly prosecute his action as aforesaid, and pay all costs and damages which may be awarded against him.

Cincinnati, O., Sept. 26, 1874.

MAX HELLMAN.
JOSEPH TROUNSTINE.
MARCUS FECKHEIMER.

Witness:
A. J. GARDNER.

Signed in my presence and approved by me this 26th day of September, A. D. 1874, at Cin'ti.

W. R. THRALL,
U. S. Marshal,
By A. J. GARDNER,
Deputy.

And afterwards, to wit, on the twenty-second day of October, in the year last aforesaid came the said defendants, by their attorneys, Caldwell, Coppock and Caldwell, and filed in the clerk's office of said
24 court their answer herein in the words and figures following, to wit:

Answer.

United States circuit court, southern district of Ohio.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen and others, plaintiff,
vs.
FREDERICK J. MAYER AND SETH EVANS, assignees under the assignment laws of Ohio of said George Bogen et al., defendants. } Answer.

And now come said defendants, Frederick J. Mayer and Seth Evans, assignees, &c., and for answer to the petition of said plaintiff, state to the court:

First. That they deny that said plaintiff, as assignee in bankruptcy of said George Bogen and others, bankrupts, was at the commencement of this action, or now is, the owner of or entitled to the immediate possession of the goods and chattels in the petition mentioned or any part of them. And they deny that they, or either of them, unlawfully detained said property or any part of it from said plaintiff as in said petition stated or otherwise, or that said plaintiff was or is damaged in the sum of ten thousand dollars, or in any other sum whatever.

Second. And said defendants further state to the court that on the 3d day of December, 1873, at Cincinnati, in the county of Hamilton, and State of Ohio, said George Bogen and Jacob Bogen, individually and as partners under the firm-name of G. & J. Bogen, and said George Bogen, Jacob Bogen, and Henry Müller, individually and as partners under the firm-name of George Bogen and Sons, by deed of that date duly executed, conveyed, transferred, and assigned to Frederick J. Mayer,
25 Seth Evans, and Florence Marmet, in trust for the equal and common benefit of all the creditors of said assignors, (among other property,) the goods and chattels in the petition herein mentioned; that said deed was, on said 3d day of December, 1873, duly delivered by the said grantors above named to said assignees therein named, and said assign-

ees then and there took possession of the property in the said deed mentioned, including the good' and chattels in said petition described, and that then and thereby the title to all of said property described and mentioned in said deed, (including the goods, chattels, and property mentioned in the petition herein,) passed out of said grantors aforesaid, and passed to and vested in the assignees named in said deed and in such other person or persons as the probate court of said county might thereafter appoint in their place or stead, (the law making provision for the enforcement of such trust through the probate court and against the failure of the same from the refusal or failure of the trustees in such case to act,) for the benefit of the creditors of said assignors, and said property has ever since been and remained so vested and held, and was so vested and held by these defendants and said Max Hellman at the commencement of this action.

And said defendants further state to the court that afterwards, on the 13 day of December, 1873, said assignees in the said deed named appeared before the probate judge of Hamilton County, Ohio, that being the county in which said assignors resided at the time of executing the said assignment, and produced the said deed, the same being the original assignment, and caused the said deed of assignment to
26 be filed in the probate court in said Hamilton County, Ohio; that afterwards said Florence Marmet declined to qualify or further act as one of the assignees aforesaid, and Max Hellman, (the plaintiff in this case,) who at a general meeting of the creditors of said Bogens was elected in the stead of said F. Marmet, was appointed in his place and stead, and afterwards, on the 21st day of January, 1874, said assignees gave bond with surety to the satisfaction of the said probate court, in the sum of five hundred thousand dollars, and proceeded with the administration of said trust, according to law and under the direction of said court; that said defendants, (and said Max Hellman,) as assignees as aforesaid, were in possession of said goods and chattels in the petition described at the commencement of this action, and were the owners and entitled to the possession of the same for the benefit of the creditors aforesaid; and they deny that any right, title, or interest in or to the property in said petition herein described, passed to or vested in said plaintiff as assignee in bankruptcy, under or by virtue of said proceedings in bankruptcy.

Defendants represent to the court that said petition in bankruptcy in said proceedings, under which said plaintiff claims to be acting, was not filed till the 22 day of June, 1874, and that no order was made on said petition in bankruptcy, or summons or notice issued on the same till the 1st day of August, 1874; that more than six months elapsed after the execution and delivery of said deed of assignment and before the commencement of said proceedings in bankruptcy, and they say that they are advised, and they state the fact to be, that the said
27 assignment is in no way set aside or affected by said proceedings in bankruptcy. Defendants state that said assignment was made in good faith for the equal benefit of all the creditors of said assignors and without any intent to evade or violate the provisions of the bankrupt act, and they deny that said assignment is or was in any manner contrary to the provisions of the bankrupt act of the United States.

And defendants further state to the court that said plaintiff Max Hellman acted with these defendants from the date of his appointment as one of the assignees aforesaid, up to the commencement of this ac-

tion, and still in fact is one of the assignees under said deed and the appointment as aforesaid by the probate court.

And of all this said defendants put themselves on the country.

CALDWELL, COPPOCK & CALDWELL,
Attys. for Defendants.

UNITED STATES OF AMERICA,
Southern District of Ohio:

Seth Evans, one of said defendants, being first duly sworn, on oath says that the facts stated in the above answer are true, as he believes.

SETH EVANS.

Affirmed to before me and signed in my presence this 22d day of October, 1874.

[SEAL.]

JOHN A. CORBIN,
Notary Public, Hamilton County, Ohio.

And afterwards, to wit, on the eighteenth day of March, in
28 the year of our Lord one thousand eight hundred and seventy-five, an entry was made on the journal of said court in said cause in the words and figures following, to wit:

Entry.

MAX HELLMAN
vs.
FREDERICK J. MAYER ET AL. } Chancery.

On motion to the court, it is ordered that the default herein be, and the same is hereby, set aside, and plaintiff has leave to file his demurrer to the answer of said defendants, and the same is accordingly filed.

And afterwards, to wit, but on the same day and year las' aforesaid, came the said plaintiff, by his attorneys, Messrs. Long, Kramer & Kramer, and filed in the clerk's office of the court aforesaid his demurrer to the answer of said defendants, which said demurrer is in the words and figures following, to wit:

Demurrer.

Circuit court of the United States, southern district of Ohio.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen and Son, and others,
vs.
FREDERICK J. MAYER AND SETH EVANS, assignees under the assignment laws of Ohio of said George Bogen & Son, and others, defendants.

And now comes said plaintiff, Max Hellman, assignee in bankruptcy herein, and, upon leave of court having been had for that purpose, demurs to the answer of the defendants, Frederick J. Mayer and Seth Evans, assignees under the assignment laws of the State of Ohio, as aforesaid, and for grounds of his demurrer says that the said answer of the defendants does not state facts sufficient to constitute a defense to this action or to the petition of the plaintiff herein filed.

MAX HELLMAN,
Assignee in Bankruptcy of George Bogen and Son et al.,
29 By LONG, KRAMER & KRAMER,
His Attorneys.

And afterwards, to wit, but on the same day and year last aforesaid, came the said plaintiff, Max Hellman, assignee, by his attorneys, Long, Kramer and Kramer, and also the said F. J. Meyer and Seth Evans, defendants herein, by their attorneys, Caldwell, Coppock and Caldwell, and filed in the clerk's office of said court their certain agreement herein, which said agreement is in the words and figures following, to wit:

Agreement.

United States circuit court, southern district of Ohio.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY, etc., plaintiff,
vs.
FREDERICK J. MAYER AND SETH EVANS, assignees, etc., defendants.

It is agreed by said plaintiff, Max Hellman, assignee in bankruptcy, &c., by Long, Kramer & Kramer, his attorneys, and by said defendants, F. J. Mayer and Seth Evans, assignees, &c., by Caldwell, Coppock and Caldwell, their attorneys, that the above-entitled action shall be heard and decided by the court on the demurrer of said plaintiff to the answer of said defendants herein filed. And if the court, after hearing the arguments of counsel, and on due consideration of the issues thus joined, shall be of opinion that said demurrer is well taken, it shall sustain the same and enter judgment for the plaintiff accordingly for the property actually taken by the marshal, under the order of delivery in this action, and delivered to plaintiff, as well as for the personal property and moneys in the hands of said defendants, as assignees as aforesaid, and not delivered to plaintiff by the marshal under said order of delivery, less the reasonable and necessary expenses of said defendants for managing and caring for said property, and less such compensation as they may be legally entitled to receive for their services touching the care and management of said property, and for one cent damages for its detention.

It is further agreed by said defendants that if the decision and judgment in this case on the said demurrer shall be against them, and in favor of said plaintiff, and shall be sustained or affirmed by the Supreme Court of the United States in case the said defendants should see proper to carry said case up to said court for the purpose of reversing such judgment, that then (or on their failure to take said case up on its affirmance as aforesaid) they will account to and pay and hand over to plaintiff all property and assets of every kind in their hands as assignees as aforesaid, including real estate and all money, after deducting their necessary and proper expenses in the management and care of the same, and such compensation as they may be legally entitled to for their services in managing and caring for said property.

And it is further agreed that if the court shall consider and find that said demurrer to said answer is not well taken the same shall be overruled and the court shall enter judgment for the defendants accordingly, and assess the damages of said defendants at the sum of $, which sum shall be the net sum received of said plaintiff from the sales by him made of the property delivered to him by the marshal under said order of delivery (less his necessary and proper expenses in the management, sale, and care of the same, and such compensation as he may be legally entitled to for his services in managing and caring for said property,) and also the net amount he has collected from the notes, claims,

book accounts, &c., placed in his hands by the marshal as afore-
31 said. And also the appraised value of all the property, notes, bills, claims, accounts, books, &c., which he received from said marshal and has not sold or collected. And in the event of such a judgment, the defendants agree to recover from said plaintiff all said unsold property and uncollected notes, bills, claims, accounts, &c., at the same nominal value and rate at which they are estimated in arriving at the above sum in satisfaction, so for, or such judgment.

And it is further agreed and expressly understood between the parties hereto that this agreement is in no way to prejudice the right of either party to take the proper steps to reverse the decision and judgment of the court which may be rendered on said demurrer, except that the mode of assessing said damages and the amount thereof shall not be error; the intention of said plaintiff, and said defendants, being to abide by the final decision of this case in the United States courts, and save the cost and delay of any further suits or actions touching the balance of the property held by said defendants, in their capacity as assignees as aforesaid. In testimony whereof said parties, by their attorneys aforesaid, have hereto signed their names and agreed to make it part of the record in said case.

Cin., March 18, 1875.

MAX HELLMAN,
Assignee in Bankruptcy of George Bogen & Son, and others,
By LONG, KRAMER AND KRAMER,
His Attorneys.

F. J. MAYOR AND SETH EVANS,
Assignees, &c., of said Geo. Bogen et al.,
By CALDWELL, COPPOCK AND CALDWELL,
Their Attorneys.

32 And afterwards, to wit, on the twenty-second day of April, in the year last aforesaid, an entry was made upon the journal of said court in said cause, in the words and figures following, to wit:

Entry.

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, bankrupts, and of George Bogen, Jacob Bogen, and Henry Müller, as individuals and as late partners as George Bogen and Son, bankrupts,

vs.

FREDERICK J. MAYER AND SETH EVANS, assignees, under the assignment laws of the State of Ohio, of said George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, and of George Bogen, Jacob Bogen, and Henry Müller, as individuals and as late partners as George Bogen & Son.

This cause came on this day to be heard on the petition of said plaintiff, and the answer of said defendants, and the demurrer of said plaintiff to said answer, and on the arguments of counsel and the issues

thus joined being submitted to the court, and the court being fully advised in the premises, find that the facts set forth in the answer of said defendants are not sufficient in law to constitute a defense to said action, and that said demurrer is well taken. And it is therefore, by the court, adjudged and considered that the said demurrer be, and the same is hereby, sustained. To which judgment of the court in sustaining said demurrer the said defendants, by their counsel, then and there excepted.

And thereupon the court (pursuant to the agreement of the parties heretofore filed herein on March 18, 1875, and which is made a part of the record in this case) proceeding to consider this case on the
33 petition of the plaintiff, the pleadings and record, find, as stated in said petition, that the plaintiff as assignee as aforesaid was, at the commencement of this action, the owner and entitled to the immediate possession of the goods and chattels in the petition described, and it is considered by the court that the said plaintiff as assignee as aforesaid, do recover against the said defendants as assignees as aforesaid, his damages, as well for the detention of said property as for the value of the property described in said petition, and not recovered by the marshal under the order of delivery in this case. And thereupon, with the assent of said plaintiff, the court do assess the damages of said plaintiff as assignee as aforesaid by reason of the premises at thirty-one thousand dollars. It is therefore considered that the said plaintiff as assignee as aforesaid, recover against the said defendants, as assignees as aforesaid, the said sum of thirty-one thousand dollars, his damages in form aforesaid assessed, and, also, his costs therein expended, taxed at $. To which finding and judgment of the court (except as to the amount of damages) the said defendants, by their attorneys, then and there excepted, and moved the court to set aside all said findings and judgment and for a new trial, which motion, on consideration, the court overruled, to which overruling of said motion said defendants then and there also excepted.

And afterwards, to wit, on the fifteenth day of May, in the year last aforesaid, came the said defendants and filed in the clerk's office of the court aforesaid their error-bond herein, which said bond is in the words and figures following, to wit:

34 *Bond.*

Supreme Court of the United States.

MAX HELLMAN, ASSIGNEE,
vs.
FREDERICK J. MAYER AND SETH EVANS, ASSIGNEES.

Know all men by these presents that we, Frederick J. Mayer, Seth Evans, Andrew Brehm, and John N. Kinney, all of Hamilton County, Ohio, are held and firmly bound unto Max Hellman, assignee in bankruptcy of George Bogen et als., in the sum of sixty-two thousand dollars, for the payment of which, well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents, signed and sealed by us on this fifteenth day of May, A. D. 1875.

The condition of the above obligation is such that, whereas the said Frederick J. Mayer and Seth Evans, assignees of George Bogen et als., under the assignment laws of the State of Ohio have obtained the allow-

ance of a writ of error from the circuit court of the United States for the southern district of Ohio, in the case above entitled, in which a judgment was entered on the 22d day of April, 1875; and the said Frederick J. Mayer and Seth Evans, assignees as aforesaid, praying the allowance of a writ of error to the Supreme Court of the United States, which was allowed, and the amount of the bond fixed in the sum of sixty-two thousand dollars.

Now, therefore, the consideration of this obligation is such that if the said Frederick J. Mayer and Seth Evans, assignees as aforesaid, shall with all practicable speed cause a transcript of the record of said cause to be filed with the clerk of the Supreme Court of the United States, and prosecute their said writ of error to effect, and answer all
35 damages and costs if they shall fail to make good the same, and abide by all orders and decrees which may be made and rendered by the said Supreme Court, then these presents shall be void; otherwise to be and remain in full force, virtue, and effect.

Signed, sealed and delivered in presence of Thos. Ambrose.

F. J. MAYER. [SEAL.]
SETH EVANS. [SEAL.]
ANDREW BREHM. [SEAL.]
JOHN N. KINNEY. [SEAL.]

36 UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, Thomas Ambrose, clerk of the circuit court of the United States for the southern district of Ohio, hereby certify the foregoing to be a true and correct transcript of the record and proceedings in the case of Max Hellman, assignee in bankruptcy of George Bogen & Son et al., vs. Frederick J. Mayer et al., assignees under State laws of said George Bogen & Son et al., as the same are kept in this office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Cincinnati, this 23rd day of June, A. D. 1875, and in the 99th year of American Independence.

Attest:
[SEAL.]

THOS. AMBROSE,
Clerk Circuit Court, U. S. South. Dist. Ohio.

37 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Max Hellman, assignee in bankruptcy of George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, bankrupts, and of George Bogen, Jacob Bogen, and Henry Müller as individuals and as late partners as George Bogen and Son, bankrupts, plaintiff, and Frederick J. Mayer and Seth Evans, assignees, under the assignment laws of the State of Ohio, of said George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, and of George Bogen, Jacob Bogen, and Henry Müller as individuals and as late partners as George Bogen & Son, defendants, a manifest error hath happened, to the great damage of the said Frederick J. Mayer and Seth Evans, assignees as aforesaid, as by their complaint appears;
38 we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties afore-

said in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable M. R. Waite, Chief-Justice of the said Supreme Court, the 12th day of October, A. D. 1874.

[SEAL.] THOS. AMBROSE,
Clerk of the Circuit Court of the U. S.
for the Southern District of Ohio.

(Indorsed:) Supreme Court U. S. Frederick J. Mayer & Seth Evans, assignees, ads. Max Hellman, assignee. Writ of error.

39 UNITED STATES OF AMERICA, *ss:*

To Max Hellman, assignee in bankruptcy of George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, bankrupts, and of George Bogen, Jacob Bogen, and Henry Müller as individuals and as late partners as George Bogen & Son, bankrupts, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein Frederick J. Mayer and Seth Evans, assignees, under the assignment laws of the State of Ohio, of said George Bogen and others above named are plaintiffs, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. R. Waite, Chief-Justice of the said Supreme Court, this 15th day of May, A. D. 1875.

[SEAL.] PHILIP B. SWING,
Judge of the District Court of the United States for
the Southern District of Ohio, sitting as a Judge of the Cir. Ct.

40 (Indorsed:) Supreme Court U. S. Frederick J. Mayer & Seth Evans, assignees, ads. Max Hellman, assignee. Citation.

We hereby accept service of within citation for and on behalf of the said Max Hellman, assignee.

LONG, KRAMER AND KRAMER,
Attorneys.

June 23, 1875.

41 UNITED STATES OF AMERICA :

Supreme Court.

FREDERICK J. MAYER AND SETH EVANS, assignees under a deed of trust for the benefit of creditors of George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, and of George Bogen, Jacob Bogen, and Henry Müller, late partners as George Bogen & Son, plaintiffs in error,

against

MAX HELLMAN, ASSIGNEE IN BANKRUPTCY OF George Bogen & Jacob Bogen as individuals & as late partners as G. & J. Bogen, bankrupts, and of George Bogen, Jacob Bogen, and Henry Müller as individuals & as late partners as George Bogen & Son, bankrupts, defendant in error.

Petition in error.

Said plaintiffs in error, Frederick J. Mayer and Seth Evans, assignees as aforesaid, state to the court that heretofore, to wit, during the April term, 1875, of the circuit court of the United States within &
42 for the southern district of Ohio, and in the sixth judicial circuit of the United States, said defendant in error, Max Hillman, assignee as aforesaid, recovered a judgment against these plaintiffs in error by the consideration of said circuit court in the sum of thirty-one thousand dollars damages and for possession of certain personal property in the petition in said action described in a certain civil action called an action of replevin then pending in the said circuit court, in which action said Max Hellman, assignee as aforesaid, was plaintiff, and said Frederick J. Mayer and Seth Evans, assignees as aforesaid, were defendants. Case No. 2063.

And these plaintiffs in error state to the court here that there was and is error in the proceedings and judgment of the said circuit court in said case, as will more fully and at large appear by an examination
43 of the record of said case, which record is hereto attached & herewith filed & referred to and made part of this petition in error; that the said error in said proceedings and judgment in said case is & was to the prejudice of these plaintiffs in error.

Said plaintiffs in error assign and call the attention of this court to the following errors of the said circuit court in said proceedings, judgment, & record of said case, to wit :

1st. The said circuit court erred in holding and deciding that said answer did not contain facts sufficient to constitute a defense to said action.

2d. The said circuit court erred in sustaining the demurrer to said answer of defendants, when it ought to have overruled the same.

3d. The said circuit court erred in holding & deciding that said Max Hellman, assignee in bankruptcy, was entitled to the possession of the goods & property described in the petition on the facts disclosed by the answer in said case.

44 4th. The said circuit court erred in not holding and deciding on the facts stated in the answer in said case that said defendants below

were entitled to the possession of said goods & property under the deed of trust of Dec. 3d, 1873.

5th. The said circuit court erred in deciding and giving judgment for said Max Hellman, assignee as aforesaid, the plaintiff in the case below, and against the said defendants below on the issues joined, when judgment should have been given for the defendants below, according to the law of the land.

The said Frederick J. Mayer and Seth Evans, assignees as aforesaid, plaintiffs in error, therefore pray that the said judgment of the said circuit court may be re-examined, & reversed on a writ of error, and the said plaintiffs in error may be restored to all things they have lost by reason thereof.

CALDWELL, COPPOCK & CALDWELL,
AND WM. F. FORREST,
For Plaintiffs in Error.

(Indorsed:) No. Supreme Court of U. S. F. J. Mayer et al., assignees, plaintiffs in error, against Max Hellman, assignee, defendant in error. Petition in error. Caldwell, Coppock & Caldwell, W. F. Forrest.

(Indorsement on cover:) No. 546. Frederick J. Mayer and Seth Evans, assignees, under the assignment laws of the State of Ohio, of George Bogen and Jacob Bogen as individuals and as late partners as G. & J. Bogen, and of George Bogen, Jacob Bogen, and Henry Müller as individuals and as late partners as George Bogen & Son, plaintiffs in error, vs. Max Hellman, assignee in bankruptcy of George Bogen and Jacob Bogen as individuals and as late partners as G. and J. Bogen, bankrupts, and of George Bogen, Jacob Bogen, and Henry Müller as individuals and as late partners as George Bogen & Son. S. Ohio, C. C. U. S. Filed July 10, 1875.

Robert Clarke & Co., Prs., 65 West Fourth St., Cin., O. [*Sept.* 1875.

Supreme Court of United States.

OCTOBER TERM, 1875.

Frederick J. Mayer and Seth Evans, Assignees in Trust for the creditors of Geo. Bogen & Son, and G. & J. Bogen, as partners, and as individuals,

Plaintiffs in Error.

546.] *vs.*

Max Hellman, Assignee in Bankruptcy of said Geo. Bogen & Son, and G. & J. Bogen, as partners, and as individuals,

Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Ohio.

CALDWELL, COPPOCK & CALDWELL, and WM. T. FORREST,

Attorneys for Plaintiffs in Error.

Supreme Court of United States.

OCTOBER TERM, 1875.

Frederick J. Mayer and Seth Evans, Assignees in Trust for the creditors of Geo. Bogen & Son, and G. & J. Bogen, as partners, and as individuals,

Plaintiffs in Error,

vs.

Max Hellman, Assignee in Bankruptcy of said Geo. Bogen & Son, and G. & J. Bogen, as partners, and as individuals,

Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Ohio.

The facts in this case as shown by the record are, that on the 3d day of December, 1873, the firms of George Bogen & Sons, wine-merchants, of Cincinnati, Ohio (composed of George Bogen, Jacob Bogen, and Henry Mueller), and G. & J. Bogen, pork-packers, of the same city (composed of said George Bogen and Jacob Bogen), being largely insolvent and unable to meet their engagements, made a deed of trust of all their property, real and personal, in trust for the benefit of their creditors; that said deed was made in good faith for the equal benefit of all the creditors of said assignors, and without any intent to evade or violate the provisions of the bankrupt act.

The laws of Ohio required that this deed should be filed, by the trustees therein named, in the Probate Court of Hamilton county, Ohio, within ten days after its execution, which was accordingly done; and afterward the three trustees (F. J. Mayer, Seth Evans, and Max Hellman) appeared before the Probate Court, and gave bond, with approved security, in the sum of $500,000, according to law.

The trustees took possession of all said property on the 3d day of December, 1873, under said deed of trust, and proceeded in good faith, and as rapidly as was consistent with the interests of the trust, to convert the same into money. A large amount of real estate was sold, and nearly one hundred thousand dollars of claims, secured by mortgage upon the realty, were paid off and discharged. Nearly all the personal property was sold by said trustees. These sales were made pursuant to the orders of the Probate Court, and according to the provisions of the statutes of Ohio governing the administration of conveyances made for the benefit of creditors.

On the 22d day of June, 1874 (more than six months after the execution of said deed of trust), a petition in bankruptcy was filed in the United States District Court in the Southern District of Ohio against the said George Bogen & Sons and G. & J. Bogen, but no order was made, or service had on said petition; nor was any action whatever taken under it until the 1st of August, 1874, when an amended petition was filed, under and according to the provisions of the amendatory act of Congress, which was approved, and took effect on the 22d day of June, 1874, the day on which the original petition had been filed. Under this amended petition, said Bogens and Mueller were afterward adjudged bankrupts, and the defendant in error was chosen their assignee in bankruptcy. Up to and until after the 1st day of August, 1874, Max Hellman, the defendant in error in this case, continued to act as one of the trustees of the Bogens and their creditors, and to this day he has not resigned his position as trustee, nor has he been

removed therefrom; and unless the operation, "*force, and effect*" of the bankrupt act has *ipso facto* worked his removal, he still occupies that position.

On the 24th day of September, 1874, the defendant in error instituted this action in replevin to recover possession of the personal property belonging to said trust from his co-trustees. The plaintiffs in error answered, setting forth the facts substantially as above stated; pleading their official and fiduciary capacity. To this answer the defendant interposed a general demurrer. The Circuit Court sustained that demurrer, and gave judgment in favor of the assignee in bankruptcy for the possession of the personal property taken by the writ of replevin, and for $31,000, the proceeds of the sale of personal property, which had been sold by the trustees prior to the proceedings in bankruptcy being commenced. To this judgment the plaintiffs in error excepted, and prosecuted this proceeding in error in this Court, to reverse the judgment of the Court below.

The following questions arise on the record in this case, for the consideration and determination of the Court:

I. Can one of several persons in joint possession of personal property, under an express trust, maintain replevin against his co-trustees?

II. Are deeds of trust, for the equal benefit of all the creditors (when made in good faith, and without intent to violate or evade the bankrupt law), rendered void by the operation of the provisions of the bankrupt act of 1867, and the amendments thereto?

III. Does the bankrupt act, for the harmonious action of its provisions, demand that the assignee in bankruptcy should dispossess the trustees under such a deed, of property vested in them, when the object of the trust is entirely equitable, and in strict accord with the letter and spirit of the enactment, and made in good faith?

IV. Is the Statute of Ohio, passed April 6, 1859 (1 Swan & Critchfield, 709), an insolvent law within the purview of any recognized decision?

V. Did not the execution and delivery of the deed of

trust, and its acceptance by the trustees and creditors, effectually and completely divest the Bogens and Mueller of all title in the property included in the trust deed, so that at the date of the commencement of proceedings in bankruptcy there was no property or right of possession in the bankrupts to be vested in the defendant in error, especially after the lapse of more than six months between the execution and delivery of the trust deed, with possession taken under the same by the trustees, and the commencement of proceedings in bankruptcy.

I. At the commencement of this action, the defendant in error, Max Hellman, was in possession of the property in controversy in this case, jointly with said Seth Evans and F. J. Mayer, under the deed of trust above mentioned. This joint possession had continued from the time they were selected as trustees. He accepted the trust created by said deed, gave bond, and qualified as one of the trustees, and acted under said deed until the commencement of this action. He has never resigned or renounced his trusteeship, or been removed therefrom. To this day he remains one of the trustees under said deed of trust. The possession of Evans and Mayer was the possession of Hellman. They were joint trustees. If, when he was elected assignee in bankruptcy, Hellman had resigned his trusteeship and relinquished his title and rights under the deed of trust, this complication would not have arisen. But he did not do so. He saw proper to hold on to both trusts; and, in so doing, he has placed himself in a position that is not tolerated by the bankrupt act. *In re* The Stuyvesant Bank, 6 Bankrupt Reg. 272. The policy of the law will not permit a man to occupy such an equivocal position.

Besides this, the deed of trust of December 3, 1873 (as we shall hereafter endeavor to show), was not void either at common law or under the provisions of the bankrupt act. Even under the ruling of the judges, who have taken the strongest ground against such deeds, they transfer the title and right of possession to the trustee, subject to the contingency of being divested at the suit of the assignee in

bankruptcy, when proceedings in bankruptcy are commenced within six months after the delivery of the deed. They are only voidable, not void. At all events, they give the trustees title and a right of possession until set aside by decree of court. We do not see how Hellman can maintain an action of replevin under the facts shown by the record in this case. Replevin can only be sustained when the plaintiff has an immediate right to the possession of the property. And the right of possession remains in the trustees, under said deed, till the same is set aside by a decree of Court. We submit that replevin is not the proper form of action; that a deed of trust, such as the one in this case, can only be set aside by the decree of a court of equity, in a proceeding instituted for that purpose.

II. As to the question whether a conveyance made in good faith, in trust for the equal benefit of all the creditors of a debtor, and made without any intent of violating or evading the provisions of the bankrupt law of 1867 (as the one in this case is admitted to be), is rendered void by the operation of the provisions of that act, we desire to call the attention of the Court, first, to the fact that such conveyances are not mentioned in the act; and, second, that they are not within the mischiefs which it was the object of the bankrupt law to remedy:

First. The 35th and 39th sections of the statute enumerates specifically what acts and dispositions of property are contrary to the bankrupt law and void. The prohibited transactions are stated at length and with care. Deeds of trust, or conveyances for the benefit of all the creditors of a debtor, are not mentioned among the things declared contrary to the act. The omission to mention them, it appears to us, is very significant, when we consider the fact that such conveyances, at the time of the passage of the act, were so universally in use, and so favorably known to all classes of people of the United States. Such dispositions of property have been known, and in constant use in all business communities for ages. They have always been in use in every State of the Union, independent of any statute on the subject.

"The general power to assign property in trust, in behalf and for the benefit of creditors, has always been recognized and approved in the fullest manner, both by the state and federal courts, as well as by the most eminent American jurists." Burrill on Assignments, p. 17.

This mode of transfer of property is as much a part of the common law of the United States as the rules governing commercial paper, and it should no more be presumed that it was the intention of Congress to change it than it should be inferred, without a plain and positive declaration, that it intended to change the mode of negotiating bills of exchange or promissory notes. And particularly is this true, when we consider that these conveyances and assignments are not contrary to the spirit and intent of the bankrupt law, but in aid of its provisions.

For Congress to change the law in reference to such transactions, and make them invalid, would require, as it appears to us, a positive and distinct enactment.

At least, the intention of the legislature, that the statute should have such an operation, ought to be so apparent as to leave no reasonable doubt—no way to escape from that construction.

"As a rule of exposition, statutes are to be construed in reference to the principles of the common law. For it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did *not* intend to make any alteration *other* than what is specified, and *besides* what has been plainly pronounced, for if the parliament had had that design, it is naturally said they would have expressed it." General Treatise on Statutes, F. Dwarris, p. 564.

Deeds of trust or assignment for the benefit of all the creditors of a debtor not being named in the bankrupt act, we proceed to consider whether a fair interpretation of the language of the 35th and 39th sections would extend the words used so as to include such transactions.

The first paragraph of the 35th section provides

against preferences to creditors or persons having a claim on the bankrupt. These provisions could not apply to a deed of trust for the equal and common benefit of all the creditors, such as the deed in this case is. No preference was given or attempted to be given by this deed. That fact is admitted by the record. The remainder of the section is as follows:

"If any person being insolvent, or in contemplation of insolvency or bankruptcy, within six (three) months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation or effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *prima facie* evidence of fraud."

The provisions of the 39th section, so far as they apply to this case, are as follows:

"That any person who, after the passage of this act, shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors."

"Or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant with intent to give a preference to one or more of his cred-

tors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent by such disposition of his property to defeat or delay the operation of this act, . . . shall be deemed to have committed an act of bankruptcy and subject to the conditions, etc., shall be adjudged a bankrupt, etc., provided such petition is brought within six months after the act of bankruptcy shall have been committed. And if such person shall be adjudged a bankrupt the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended and that the debtor was insolvent."

These are all the provisions of the bankrupt law that in any manner limit conveyances or dispositions of property. Whatever transaction is not specifically mentioned above, or reasonably included within the meaning of the language there used, remains unaffected by the bankrupt act.

Three classes of transactions are clearly described and prohibited by the provisions of the 35th and 39th sections of the statute, and we think only three.

The first are preferences given to a creditor or person having a claim on the insolvent.

The second are dispositions of property made for the purpose of delaying, defrauding, or hindering creditors; and the third are conveyances, transfers, or dispositions of property made, or transactions entered into or suffered for the purpose of defeating or delaying or evading the operation of the bankrupt law.

As we said above, the provisions against fraudulent preferences can not extend to this deed, for no preference was intended or attempted by it. And it is equally clear that that part of the statute against acts done with intent to delay, defraud, or hinder creditors, can not be extended to prohibit conveyances for the common benefit of all creditors. That such conveyances are not within the statute has

been so often decided by our courts that it has become an elementary principle of our law.

The remaining provisions of said sections were evidently intended by Congress to prevent evasions of the statute; to prevent persons from purposely combining together to defeat the object of the bankrupt law. And this it appears to us was the only intention of the legislature in making these enactments. When the tests set forth in these provisions for determining to what transactions the enactments are to extend are applied, it appears to us they limit the operation of this part of the act exclusively to conveyances and dispositions of property or rights made for the purpose of evading the statute.

Only such transactions are declared void as are made *with a view* to prevent property from coming to the assignee in bankruptcy, etc., etc., or "with the intent of such disposition of his property to defeat or delay the operation of this act."

It is not sufficient that the debtor is insolvent or acting in contemplation of insolvency, but the other party must have reasonable cause to believe that the act is done "with a view" to violate or evade the provisions of the bankrupt law.

This "view" or "intent" is a necessary part of every transaction which falls under these provisions. The "intent" must be shown to exist in the transaction in order to bring it within the purview of the act.

In the language of Mr. Justice Miller, in the case of *Wilson* v. *City Bank*, 17 Wall. 484: "There must be *the positive purpose of doing an act forbidden by that statute*, and the thing described must be done in the *promotion of this unlawful purpose.*"

When we apply that test to the deed of assignment in this case, we find that it is not only not included, but it is excluded from the operation of the provisions of the 35th and 39th sections of the bankrupt act; for it is admitted among the facts of this case that said deed was made in good faith for the equal benefit of all the creditors of said

assignors, and *without any intent to evade or violate the provisions of the bankrupt law.*

We do not see how, by any of the ordinary and accepted rules established for the construction of statutes, the language of the bankrupt law can be construed to extend to, and render void, deeds of trust made in good faith, such as the one under consideration is admitted to be. And especially is this the case when we come to consider, *secondly*, that such conveyances are not within the mischiefs which it was the object of the bankrupt law to remedy.

The object of the bankrupt act was to secure a fair and equal division of the debtor's property among all his creditors; to prevent preferences, and to avoid all manner of sales or dispositions of property that may defeat a fair and honest division of the debtor's effects. Of course, it was the intention of the bankrupt act to reach, and it does reach, and avoid all acts done in fraud of the provisions of said law, within the time limited, no matter under what forms or pretenses they may be cloaked. But it is only such transactions as are fraudulent, fictitious, or pretended—such as are not entered into in good faith; such as are for the purpose of covering up or hiding property from the creditors—that fall within the provisions of the law. The bankrupt statute in none of its provisions attacks honest transactions, but, on the contrary, it sustains, encourages, and protects them. *Tiffany* v. *Lucas*, 15 Wall. 422. For an insolvent debtor to turn over his property, for the equal benefit of all his creditors, has always been considered his duty, and such transactions have been upheld and commended by the courts and all business communities.

Lord Ellenborough, speaking of an assignment for the benefit of creditors, says: "Such an assignment as the present is to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor to make the fund available for the whole body of creditors." *Pickstock* v. *Lyster*, 3 Maule & Selwyn, 374.

"Every debtor has a legal right to assign property for the security of the debts due by him, and so far from such an act being reprehended by the law, it is justified and approved." *Brown* v. *Minturn*, 2 Gallison, 557.

"I think that where an assignment is for the benefit of all the creditors of the assignor, equally and ratably, it must command the sanction of every enlightened tribunal." *The United States* v. *The Bank of the United States*, 8 Robinson, 262.

Many other cases might be cited to show that assignments for the benefit of all the creditors of an insolvent debtor are looked on with favor by our courts, and always have been, but it appears to us unnecessary to adduce authorities to sustain such a proposition. It is sufficient to say that no case can be found condemning such an assignment made in good faith.

Such transactions were not the mischiefs which called for legislation by Congress. It was the failure to make such dispositions of property by debtors that induced Congress to act and to provide a means of compelling the unwilling, insolvent debtor to surrender his property for the common benefit of his creditors.

The *primary object* of the bankrupt act, both in its voluntary and involuntary provisions, as stated by this Court in the case above mentioned of *Wilson* v. *City Bank*, *is to secure a just distribution of the bankrupt's property among his creditors.*

Deeds of trust, such as the one under consideration, therefore, instead of being contrary to the spirit of the bankrupt act, are in aid of its provisions. They have been said "to carry out the equitable principles of a bankrupt law through the medium of a private contract." They are a cheap, expeditious, and convenient mode of arriving at the objects intended by the bankrupt law. We can see no reason which would induce Congress to place restrictions on such proceedings. They should rather be encouraged.

Not being named in the act, and not being contrary to its spirit and object, nor among the mischiefs which it was

the purpose of the bankrupt law to remedy, we do not think that deeds of trust or assignments made in good faith and for the common benefit of all creditors of the debtor, such as this deed is admitted to be, can be held to fall among the transactions made void by the statute.

This construction of the statute has been sustained by Judge Nelson, in the case of *John Sedgwick, Assignee*, v. *James K. Place et al.*, in the Circuit Court of the United States for the Southern District of New York. Judge Nelson held, in that case, that: "A general assignment, by insolvent debtors, under the New York state law, for the benefit of creditors, untainted by fraud, as against any creditors or the bankrupt act, is valid, and the property will not be turned over to the assignee in bankruptcy."

And in the case of *Langley* v. *Perry*, in the United States Circuit Court for the Southern District of Ohio, 2 Bankrupt Register, 180, the facts were as follows: Perry had commenced suit against Langley, in the Common Pleas Court of Gallia county, Ohio, and would get judgment at the term of said court, commencing on the 27th day of May, 1867. On the 25th of May, 1867, Langley being insolvent, made a general assignment of all his property in trust for all his creditors. The assignees accepted the trust, and, on the 25th of May, 1867, filed the deed in the Probate Court of said county, under the statutes of Ohio, and proceeded to administer the trust. On the 17th of July, 1867, Perry filed a petition against Langley in the District Court, setting forth the assignment, and claiming that it was made with intent to hinder and delay him in the collection of his debt, and also with intent by such disposition to defeat and delay the operation of the bankrupt act, and was therefore an act of bankruptcy. Langley answered, denying the intent charged. In the District Court the assignment was held to be an act of bankruptcy. Mr. Justice Swayne delivered the opinion of the Circuit Court, reversing the ruling of the District Court. He held: "That when a creditor is about to recover a judgment against his debtor in Ohio, and the debtor makes a

general assignment of all his property for the benefit of all his creditors, before the judgment is rendered, such conveyance is not necessarily a conveyance with intent to delay, defraud, or hinder creditors. And when such an assignment is made, under like circumstances, with intent to secure an equal distribution of all the debtor's property among all his creditors, is not necessarily a conveyance of property with intent to defeat or delay the operation of the bankrupt act. *To make such an assignment an act of bankruptcy, it must be made with intent to delay, defraud, or hinder creditors within the meaning of the statute of* 13 *Elizabeth, or* with intent to defeat or delay the operation of the bankrupt act. It becomes a question of fact. *The innocence or guilt of the act depends on the mind of him who did it, and it is not a fraud within the meaning of the bankrupt law, unless it was meant to be so.*"

III. Does the bankprupt law for the harmonious action of its provisions demand that the assignee in bankruptcy should dispossess the trustees (under such a deed as the one in this case is admitted to be) of property vested in them, when the object of the trust is entirely equitable and in strict accord with the letter and spirit of that enactment?

The affirmative of this proposition was strongly insisted on in the argument of the case below by counsel for the defendant in error. Indeed it was the principal point made and relied on by them. And the court appears to have based its decision on that ground. The argument was, that unless the statute is construed to have the force and effect of avoiding such deeds or assignments for the benefit of creditors, on an adjudication of bankruptcy, there must be a conflict of jurisdiction between the United States and state authorities; and that the provisions of the bankrupt act can not be carried out and enforced if such trusts are permitted to stand and be enforced by the trustees after an adjudication in bankruptcy. But no such conflict can arise. The difficulties suggested are imaginary. Whatever matters and transactions fall within the purview of the

bankrupt act will be controlled and administered by the courts of the United States, and we apprehend there is very little danger of the courts of any state attempting to interfere, or if they did, that their interference would be of long duration. Whatever is not reached or affected by the bankrupt law remains subject to the control of the common law or the statutes of the states. But it remains there by the will of Congress, just as much as other matters fall under the exclusive jurisdiction of the bankrupt courts. In the language of Chief Justice Marshall, in the case of *Sturges* v. *Crowninshield*, 4 Wheat. 122: "It may be thought more convenient that much of it (the subject of insolvency) should be regulated by state legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the constitution, and is certainly a convenient one, to consider the power of the states as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined as the wisdom of that body shall decide.

If Congress had seen proper to declare that deeds of trust or assignments made in good faith and for the benefit of all creditors, were acts of bankruptcy and void, they would have been so, because there is no question but that Congress has full power to so enact, and for the same reason if Congress has seen fit to exclude them from the operation of the act it is equally certain that they remain valid. Congress has been invested by the Constitution with plenary power over the subject. It is for Congress to say when a bankrupt law shall be passed and when repealed; and it is equally within its power to say to what matters it shall extend and what shall not be affected by it. If a thing is not within the purview of the act, how can a conflict of authority arise about it any more than about a matter which is admittedly within the operation of the law? If the matter is not covered by the act the bankrupt courts and officers have nothing to do with it. It remains where

it did before the bankrupt law was passed. We do not see how the question of the supreme authority of the acts of Congress can arise in this case. We admit the proposition that the acts of Congress in reference to bankruptcy are supreme. It is not a question whether Congress had the power to enact a law declaring such deeds of trust void, but the question is, *did* it pass such a law? Has the law it made such force and effect, or was it the intention of the national legislature that it should so operate?

It is contended that the intention of Congress to include such transactions as the one now before the Court, within the scope of the statute, is discoverable from the spirit, object, and policy of the act. But we deny that the rules adopted by courts for their guidance in the interpretation of statutes, when applied to the bankrupt act of 1867, lead to any such exposition of the law as is claimed by counsel for the defendant in error.

We will further examine this question of the intention of Congress, by a compromise of the present statute with the former acts of Congress on this subject.

The act of 1800 (section 10), provided that the assignment of the commissioners of the bankrupt's estate and effects should be good at law or in equity, against the bankrupt, and all persons claiming by, from, or under such bankrupt, *by any act done* at the time, or after he shall have committed the act of bankruptcy, upon which the commission issued, except in case of a *bona fide* purchase made (before the issuing of the commission) from the bankrupt, for valuable consideration, by any person having no knowledge, information, or notice of any act of bankruptcy. That act did not pretend or attempt to specify what particular transactions should be considered within the act and void, but declared that *every act was void*, except purchased in good faith for value and without notice of the act of bankruptcy.

The provisions of the statute of 1841, which prescribe what transactions it shall extend to and avoid, are as follows:

SEC. 2. "That all future payments, securities, conveyances, or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety or other person any preference or priority over the general creditors of such bankrupt; and *all other* payments, securities, conveyances or transfers of property, or agreements made or given by such bankrupt, in contemplation of bankruptcy, to any person or persons whatever, not being a *bona fide* creditor or purchaser for a valuable consideration, without notice, shall be deemed utterly void, and a fraud upon this act; and the assignee under the bankruptcy shall be entitled to claim, sue for, recover, and receive the same as part of the assets of the bankruptcy;" . . . *Provided*, That all dealings and transactions by, and with any bankrupt, *bona fide*, made and entered into more than two months before the petition made and filed against him, or by him, shall not be invalidated or affected by this act; *Provided*, That the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act."

The section contains a saving as to any lawful rights of married women and minors, and any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the state, and not inconsistent with the act.

This act, it will be observed, is much more limited in the extent of its operations than the first law. Instead of applying to everything done by the bankrupt after the act of bankruptcy, it is limited to such as are done "in contemplation of bankruptcy," and it excludes transactions with "*bona fide* creditors" as well as purchasers for value without notice. But notwithstanding these limitations, the language is very general and comprehensive. It says, "*All future* payments, etc., made in contemplation of bankruptcy, and for the purpose of giving any creditor any preference," etc. "*And all other* payments, etc., made by the

bankrupt in contemplation of bankruptcy to *any person or persons whatever*, not being a *bona fide* creditor or purchaser for value and without notice, *shall be utterly void.*"

Under this act every conveyance or transfer of property made in contemplation of bankruptcy to a party not a creditor or purchaser, was utterly void. It made no difference what the object of the conveyance was. If it was made in contemplation of bankruptcy (and not to a *bona fide* creditor or purchaser for *value*, and without notice), it fell within the language of the act. It was not necessary that the assignee should show with what "intent" it was made; all that he had to establish was that it was made in contemplation of bankruptcy, and that entitled him to recover the property, unless the other party could bring himself under the exception of being a creditor or purchaser within the meanieg of the exception. Under the language used in the second section of the act of 1841, deeds of trust, or assignments for the benefit of creditors, would undoubtedly be comprehended. They would be included in the natural and plain meaning of the words used by Congress. As we said above, it made no difference under that statute what the purpose or "intent" of the parties to the transaction was, so it was made by the bankrupt in contemplation of bankruptcy; that alone brought it within the operation of the law. The honesty or good faith of the parties had nothing whatever to do with determining the matter. It comprehended every transfer made in contemplation of bankruptcy, except to creditors and purchasers as above mentioned. The decisions of the courts under this statute, and under the act of 1800, that deeds of trust, or assignments for the benefit of creditors, were within their operation and void, were undoubtedly correct. The language used in both acts clearly comprehends such transactions.

The courts of England had gone to the full extent of declaring that (under the English statutes of bankruptcy) conveyances and assignments for the benefit of creditors were acts of bankruptcy, and void as against the assignee in bankruptcy. But this construction of the statute was

afterward criticised and condemned by such judges as Lord Elden, who, in the case of *Bourne, ex parte*, 16 Vesey, Jr. 147, speaking of this construction, says: "It was carried to *this extravagant length* that, though the assignment was intended for the benefit of all the creditors, including that one, yet it was an act of bankruptcy."

This ruling of the courts of England induced Parliament to modify the law, in this respect, so that, as stated by Burrill (page 16), such transfers appear to be coming into more general use in England.

Our bankrupt law of 1841 was passed before the change in England took place.

The statute of 1841 did not remain in force long. It was repealed before it had been in operation for two years. May its short life not have been owing to the fact that its provisions were so comprehensive; that the established usages of the business community were too much interfered with by its sweeping and stringent provisions?

We think that was the real secret of the dislike of our people to it.

Instead of improving on the English act, it enacted into law the unnatural construction which the English courts, years before, had fastened on their statute—a construction which we have said above was regretted by their best jurists, and which was afterward to some extent remedied by act of Parliament. But the statute of 1841 "has paid the penalty of its mischiefs by death."

Over twenty-five years elapsed between the passage of the act of 1841 and our present bankrupt law. In the meantime the change in the English statute, whereby assignments for the benefit of creditors were permitted under certain restrictions, took place, and voluntary assignments became more numerous and grew in public favor in this country. In many of the states, statutes were passed to regulate such transfers and more effectually carry out their objects.

Such an act was passed in Ohio in April, 1859.

When the two former bankrupt acts are compared with

the present statute, an entire change in the character of the law is discovered. Congress, in framing the act of 1867, appears to have carefully avoided the evils which were so fatal to the law of 1841. The policy of the former statutes were to make every act done within the periods prescribed, and not falling strictly within the letter of the exceptions, "utterly void." The present act, on the contrary, leaves *all transactions stand*, except those specifically mentioned and described in the act. The former statutes did not consider whether the act done was in good faith or dishonest. The present act looks almost exclusively to the good faith of the act complained of. The intent of the transaction is the test prescribed by the present law for determining whether the act is legal or illegal. It upholds all acts done in good faith and in furtherence of its objects.

Congress had the act of 1841 before it when our present law was passed. This is evident from the similarity of many of the provisions. A large part of the eight section of the act of 1841, for instance, is literally incorporated in the second section of the present act. Yet we find Congress was not satisfied with the provisions of the former law. It greatly modified and changed them. And it is a familiar rule of law, as stated by Judge Thurman, in the case of *Bloom* v. *Richards*, 2 Ohio St. 403: "When a considerable change is made in the phraseology of a former law, the inference is reasonable that a change of meaning was also intended." The intention of Congress in making the changes in the bankrupt law, that we have pointed out, was to limit rather than extend the operation of the bankrupt law of 1867, in respect of the matters that should be affected by it; to consider the good faith of a transaction and to encourage, rather than prevent, acts honestly done to "secure a just distribution of the bankrupt's property among his creditors." And instead of such deeds of trust as the one under consideration being contrary to the spirit, object, and policy of the law, it appears to us they are strictly in accord with the spirit and policy of the statute; and so far as we can discover the intention of Congress, it

was that they should remain valid and unaffected by the law when made in good faith, and without any intent of violating or evading the statute.

In the language of the Supreme Court in the case of *Wilson* v. *City Bank*, above referred to: "We do not construe the act as intended to *cover all cases of insolvency to the exclusion of other judicial proceedings.* It is very liberal in the classes of insolvents which it does include, *and needs no extention in this direction by implication.*"

In the argument of this case below, great stress was put on the authority of the cases of *Sturges* v. *Crowninshield*, 4 Wheat. 122, and *Ogden* v. *Sanders*, 12 Wheat. 213. Now, everything that was decided in these cases, so far as the decision relates to this case, was, that "since the adoption of the constitution of the United States a state *has authority to pass a bankrupt law*, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of Congress in force to establish a uniform system of bankruptcy *conflicting with such law.*"

"Whenever the terms in which a power is granted by the constitution to Congress, or whenever the nature of the power itself require that it should be exercised exclusively by Congress, the subject is as completely taken away from the state legislature as if they had been expressly forbidden to act on it. *The power granted to Congress of establishing uniform laws on the subject of bankruptcies, is not of this description.*"

It might be claimed with great plausibility, under the above decision, that even after Congress had passed a bankrupt law, state bankrupt laws are not void except so far as they conflict with the law of Congress. The decision does not go further than that; but we do not intend to insist that state bankrupt laws are not suspended in their operation *ipso facto* on the passage of a bankrupt law by Congress. We think the better opinion is that they are. That was the conclusion announced by Justice Story in *ex parte Eames*, 2 Story's Rep. 322.

We are not claiming under a state insolvent or bankrupt law. The deed of trust in this case does not depend for its validity on any insolvent law. It is wholly independent of any such law. There is nothing in either of said cases, or in the Eames case, that goes to the length of holding that conveyances for the equal benefit of all the creditors of a debtor, when made in good faith and without the intention of violating or evading a bankrupt law, is void; nor is there anything in either of these decisions that even looks toward such an opinion.

IV. This brings us to the consideration of whether the act of the legislature of Ohio, passed April 6, 1859, is an insolvent law within the meaning of the decisions. It is difficult to define precisely what is meant by an insolvent law.

The definition given by Webster of an insolvent law is "a law which liberates a debtor from imprisonment, or exempts him from liability to arrest and imprisonment on account of any debt previously contracted. These terms (insolvent law or act of insolvency) may be considered as generic, comprehending also bankrupt laws which protect a man's future acquisitions from his creditors. But in a limited sense, as the words are now generally used, an insolvent law extends only to protect the person of the debtor from imprisonment on account of debts previously contracted." Webster's dictionary, edition of 1861.

Chief Justice Marshall, in the case of *Sturges* v. *Crowninshield*, in speaking of the distinction between bankrupt and insolvent laws, says: "The line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws." But this distinction is doubted by him. "Another distinction," he says, "has been stated and has been uniformly observed. Insolvent laws operate at the intance of the imprisoned debtor; bankrupt laws at the in-

stance of a creditor." He also questions this test, and says: "This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law."

In Hilliard on Bankruptcy and Insolvency, p. 3, it is said: "Bankrupt and insolvent laws are intended to secure the application of the effects of the debtor to the payment of his debts, *and then to relieve him from the weight of them.* Three great objects are manifest in the system of insolvent laws: First, a distribution of all the insolvent's property; second, an equal distribution of his property amongst all his creditors when it is insufficient to pay the whole; and third, *to discharge an honest debtor from all prior debts.*" The statute of New York, of April 3, 1801, is spoken of by the judges in the case of *Ogden* v. *Sanders*, 12 Wheat. 213, as an insolvent law. And the act of the legislature of Massachusetts, of April 23, 1838, is called an insolvent law by Justice Story in *ex parte Eames*, 2 Story, 322.

Each of these acts, however, discharged the debtor from the obligation of his contracts. From the above authorities we may safely say that one distinct and necessary feature of every insolvent law is that it *discharges the debtor* from something. It may be that he is only discharged from the liability to arrest or imprisonment, or the act may go further and discharge him from liability to pay pre-existing debts. The insolvent laws of many of the states include both of these features. Such laws as discharge the contract as well as the person, may very properly be called bankrupt laws, though they are generally spoken of as insolvent laws. But we apprehend no law would be called an insolvent law if it did not include the feature of discharging the debtor either from liability to arrest or imprisonment, or from his contracts.

The act of the Ohio legislature, passed April 6, 1859, entitled, "an act regulating the mode of administering as-

signments in trust for the benefit of creditors," has none of the distinctive features of an insolvent law as above defined. It has not a single ear-mark of such a law. It does not purport or attempt to discharge the debtor either from arrest or imprisonment, or to free him from future liability. His after-acquired property is liable to his creditors to the same extent in every particular as if he had not made an assignment in trust for his creditors. Deeds of trust are not the creatures of that law. They existed in Ohio and were constantly recognized and used for fifty years before this law was passed. They derive their force and effect from the common law, and not from the statute. The statute does not give such deeds any power or validity. All it does is to prescribe a mode of enforcing the trust. It found them already established, and simply provided for the better security of the creditors by requiring that the trustees should give bond for the faithful discharge of their trusts, and should file statements showing what had been done, and provided a simple and speedy means of enforcing and regulating the trust, which, before that act was passed, had to be sought through a court of chancery.

The language of the act of the legislature is as follows (1 Swan & Critchfield, 709): "That *when* any person shall make an assignment to a trustee of any property, money, rights, or credits in trust for the benefit of creditors, it shall be the duty of said trustee, within ten days after the delivery of the assignment to him, and before disposing of any property so assigned, to appear before the probate judge of the county in which the assignor resided at the time of executing the said assignment, produce the original assignment or a copy thereof, cause the same to be filed in the Probate Court, and enter into an undertaking, payable to the State of Ohio, in such sum and with such sureties as shall be approved by the judge, conditioned for the faithful performance by said trustee of his duties, according to law." . . .

The second section provides: "If any assignee, as aforesaid, shall not, within ten days after his nomination to

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The second section provides: "If any assignee, as aforesaid, shall not, within ten days after his nomination to

such trust, comply with the provisions of the first section of this act, it shall be the duty of the probate judge, on application of the assignor, or any one or more of his creditors, to remove the said assignee, and appoint another in his stead, who shall thereupon immediately comply with the provisions of the foregoing section; and the probate judge shall make and enforce all necessary orders to put the said trustee so appointed into possession of any property, money, rights, or credits belonging to the assignor at the time he made said assignment."

The statute contains other details as to the mode of selling the property, declaring dividends, etc. But in every particular it is only an enactment of the rules of equity which had been established and enforced by courts of chancery in their administration of such trusts before its passage. The only object of the law is to secure a fair and honest enforcement of the trust, and to secure an equal distribution of the property among all the creditors. The only purpose that a debtor can have in making an assignment in trust for creditors under it is to prevent one creditor from getting a preference over the others. He gets no certificate, release, or discharge. If he desires this he must proceed under the provisions of the insolvent law of the State, which is an entirely different proceeding.

This insolvent law in Ohio was passed in 1831 (1 Swan & Critchfield, 696), and has been in force for over forty years. It provides for the appointment of commissioners of insolvency to whom a surrender is to be made by debtors seeking for the benefit of the act, and for the granting to the debtor by the commissioner on such surrender a certificate of discharge, which releases him from imprisonment.

These two statutes are entirely distinct from each other. The statute of 1859 is no part of the insolvent law of Ohio. Each statute operates on different persons and in entirely distinct modes. The relief granted by the insolvent law is for the benefit of the debtor, by which he procures his discharge from imprisonment. The relief granted by the act of 1859 is for the benefit of the creditor,

to enable him to enforce a trust without the delay and cost attending a suit in a court of chancery.

The relief granted under the insolvent law is through a proceeding in the Common Pleas Court. The relief under the act of 1859 is through proceedings in the Probate Court.

The act of 1831 is called in its title, "an act for the relief of insolvent debtors." It falls within the definition of an insolvent law as given in the authorities above cited. The act of 1859 is not called an insolvent act in its title, nor does it fall within the definitions above quoted. It has none of the characteristics either of an insolvent or bankrupt law, and we submit that it does not fall within the purview of the decisions which declare that the bankrupt law suspends all State insolvent laws.

In this connection we desire to call the attention of the Court to a decision of the Supreme Court of Michigan, in the case of *Cook et al.* v. *Rogers*, as reported in the American Law Register for July, 1875, p. 453.

On November 18, 1873, Albert Bow made a voluntary assignment, for the benefit of his creditors, to Eli B. Rogers, the assignment being without any preference. Plaintiffs thereupon sued Bow and garnisheed Rogers. They recovered judgment against the principal defendant. In the garnishee case it appeared that the only property of Bow's that Rogers held, was that he had received, by virtue of such assignment, and that his only intent in this case was that of trustee under the assignment, and that the value of the assigned property in his hands was greater than the amount of the judgment against the principal defendant. The Court below held the assignment valid, and that the possession by Rogers of the property, in virtue thereof, gave no right to plaintiffs, as creditors of Bow, to maintain garnishee process against Rogers; and judgment was rendered in Rogers' favor for costs. It is insisted that this common-law assignment, though otherwise unobjectionable, is rendered void by the existence of the federal bankrupt law. The argument is that the bankrupt law *ipso facto*,

supersedes all State insolvent laws; that the common-law principles prevailing in this State, on which voluntary as-assignments for the benefit of creditors are based, and to which they owe their legal efficacy, are a part of the State system regulating and governing in cases of insolvency, and are within the principle which causes a bankrupt act to work suspensions of incompatible regulations, and, hence, can have no force while such act exists.

"*Held*, That there is no proper analogy between insolvent laws, correctly so called, and those principles of common law which allow and sanction such an asignment, and no such resemblance or relation as to warrant the conclusion that the bankrupt act suspends the latter as well as the former, and that in a State at least where common-law assignments for the benefit of creditors have not been absorbed into, or connected with the local insolvent laws, but rest entirely upon common-law principles, they are not *ipso facto* void, simply because a bankrupt law is in force, and in the absence of any attempt to proceed under the bankrupt act: *Held*, further, That the result of the proposition stated would be in effect to make the bankrupt law operate to defeat an instrument intended and designed to square exactly with what has been held to be the 'main purpose' of the act itself—namely, equal distribution of the property of the debtor *pro rata* among his creditors." The same principle is decided by the Supreme Court of Connecticut, *in re* Hawkins, 2 Bankrupt Register, 122.

V. What interest in the property in controversy in this case passed to the assignee in bankruptcy on the adjudication of the bankruptcy against the Bogens and Mueller?

The 14th section of the bankrupt law provides that "the judge, or where there is no opposing interest the register, shall, by an instrument under his hand, assign and convey to the assignee, all the estate, real or personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of said proceeding in bankruptcy, and thereupon, by operation of law, the title to all such property and

estate, both real and personal, shall vest in said assignee." And a proviso to said section further enacts as follows: "And all the property conveyed by the bankrupt in favor of his creditors; all rights in equity; choses in action; patents or patent-rights and copy-rights; and all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract, or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate, with the like right, title, power and authority to sell, manage, dispose of, sue for and recover, or defend the same, as the bankrupt might or could have had, if no assignment had been made, shall, in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in such assignee."

It will be observed that this section does not declare any conveyance or transaction void. Even conveyances made for the purpose of defrauding creditors are not declared void by it. Judge McDonald, of the United States District Court for Indiana, in the case of *Bradshaw* v. *Kline*, 1 Bankrupt Register, p. 146, in speaking of the provisions of this section in reference to fraudulent conveyances, says: "I think the provision above cited from the 14th section, relates to the State statutes against fraudulent conveyances, and to these only." And Chief Justice Chase, *in re* Wynne, 4 Bankrupt Register, p. 5, referring to this section of the bankrupt law, says: "It does not make any conveyance or incumbrance fraudulent."

The consequence is, that this section operates only on the property or estate of the bankrupt remaining on hand and undisposed of at the time of the commencement of proceedings in bankruptcy, and such as had been conveyed to defraud creditors. The assignee steps into the shoes of the bankrupt as of the date of the filing the petition in bankruptcy.

This section does not extend to property conveyed or

disposed of in violation of the provisions of the 35th section of the act. The right to recover this latter class of property is given to the assignee in the 35th section itself, and is subject to various conditions and limitations. There are no limitations attached to the right of the assignee to possess himself of the property vested in him by the 14th section. It appears to us that the defendant in error can not claim any title to the property in controversy under the provisions of the said 14th section. The property in controversy was not in the possession of the said Bogens or Mueller at the filing of the petition in bankruptcy, nor had they any title in it to be "vested" in their assignee, nor had the property been conveyed for the purpose of defrauding creditors. If the deed of trust in this case is void, or voidable, it must be by reason of its being within the prohibitory provisions of the 35th and 39th sections; it must be contrary to the letter or spirit of those sections.

For the purpose of the argument, let us suppose that a deed of trust like the one in this case, is contrary to said sections of the law. That would not help the defendant in error, because neither of said sections apply to any transactions that did not happen within six months before the commencement of proceedings in bankruptcy. The language of the 35th section is "that if any person being insolvent, or in contemplation of insolvency *within six months* before the filing of the petition by or against him, makes any payment, sale," etc., etc., the sale, etc., "shall be void, and the assignee may recover the property or the value thereof, as assets of the bankrupt." And the 39th section contains the same limitation.

The language of these sections, limiting their operation to acts done *within six months* before the commencement of proceedings in bankruptcy, is as clear and positive as it could possibly be made. There can be no doubt of the intention of Congress to limit the operation of the statute to transactions had within the time named. *Doe* v. *Childress*, 21 Wall. 642. Every transaction of the bankrupt had within six months before the commencement of proceedings in

bankruptcy, is subject to be examined, and liable to be set aside at the suit of the assignee, if found contrary to, or in fraud of the bankrupt act, but when the bankrupt and his creditors have neglected for six months to institute proceedings in bankruptcy, the policy of the law will not permit them to question things done more than six months before they took steps to have an adjudication in bankruptcy pronounced. The law presumes conclusively that they have acquiesced in everything done more than six months before they commenced to act. It applies to every disposition of property made contrary to the provisions of the 35th section. There is no exception to this limitation.

The reason and good sense of such a limitation are very obvious. It is necessarily injurious to the interests of society, and particularly to a business community, to have the question of whether transactions are legal or illegal depend on the fact of whether proceedings in bankruptcy will afterward be instituted. It destroys that certainty and confidence so essential to commercial prosperity. The time within which the legal character of the transaction must remain uncertain should be made as short as possible. And in a case like the present, there is still stronger grounds for enforcing the limitations. Here an assignment for the benefit of all creditors is made. No one questions its validity or entire good faith. Large amounts of property, both real and personal, were sold in carrying out the purposes of the assignment. Nearly a hundred thousand dollars' worth of real estate alone were sold and conveyed. Every one supposed the proceedings were legal and proper. Now, after more than eight months from the date of the assignment, the Bogens are adjudged bankrupts, and it is proposed to draw in question, and the defendant in error in this case has drawn in question, the validity of all of said proceedings. And it is worthy of notice that the Bogens were not adjudged bankrupts by reason of having made the assignment, but because they did not pay their commercial paper, which fell due twenty-nine days after this assignment.

The petitioning creditors, after the act of bankruptcy of which they complain had been committed, stood by and saw this assignment being executed—saw property being sold and liabilities being incurred, without taking any steps till the 22d day of June, 1874, when the petition in bankruptcy was filed. We will hereafter speak of this petition. But not only this, the defendant in error in this case was all this time acting as one of the assignees under said deed of assignment.

This case is, therefore, we think, a good illustration of the wisdom of confining the retroactive force of the bankrupt statute to a short period, as Congress has done, and of the necessity of the courts refraining from extending it beyond the period fixed.

But granting that voluntary assignments for the benefit of creditors are contrary to the prohibitory clauses of the 35th section of the bankrupt act (which we by no means concede), they are not absolutely void, but merely voidable. The title passes by them subject to the contingency of being divested, if proceedings in bankruptcy are commenced within six months. If no proceedings in bankruptcy are commenced they are valid and binding on all parties. It is only at the suit of the assignee in bankruptcy, and when proceedings in bankruptcy have been commenced within six months after the assignment, that they can be impeached and set aside.

Even in cases where the courts have gone to the full length of declaring that such assignments are within the purview of the bankrupt act, they have always held that their being void depended on the fact that proceedings in bankruptcy were commenced within the period prescribed by the statute. *In re* Cohn, 6 Bankrupt Reg. 379, it is said: "The 35th section only says such an assignment is void, if it is made within six months before the filing of the petition by or against the bankrupt. Then, if a petition is not filed within six months by or against a bankrupt, such an assignment would stand. It then has virtue or vitality enough to live, if not attacked within six months. This

must be in it from the first, for it continues good unless the petition is filed within six months. It is in the nature of a conditional conveyance, the condition being that no petition in bankruptcy shall be filed 'within six months.' It continues to exist, and is good, if such petition is not filed within that time. It is then only voidable by the filing of such petition in said time."

The Supreme Court of Errors of Connecticut, in case of *Maltbie* v. *Hotchkiss*, as reported in 5 Bankrupt Reg. 485, held that an assignment for the benefit of creditors is, by the 35th section of the bankrupt act, made void, only if made within six months before the filing of the petition in bankruptcy. "It is not claimed" says the Court, "that the bankrupt act by express terms makes the conveyance in this case void; it is only claimed that it does so by necessary implication. But we think that the implication from the sections of the act above referred to (secs. 35 and 39) is clear and decided the other way; and that Congress intended that this and all similar conveyances should be good, unless attacked under the bankrupt act within six months."

The United States Circuit Court for Missouri, in case of *Bean, Assignee*, v. *Brookmire & Rankin*, 4 Bankrupt Reg. 57, held that "the limitation of four and six months in section 35 are limitations upon payments and conveyances, which are otherwise valid under the common or statute laws of the State:" that "the first subdivision of section 35 of the bankrupt act, with its limitation of four months, applies only to cases of payments or conveyances made to a creditor in consideration of pre-existing debts by way of preference, *while the second subdivision applies to other transfers and conveyances made contrary to the provisions and policy of the bankrupt act, or in fraud of the act.* The provisions of section 39, avoiding certain acts, are subject to the limitations of four and six months contained in section 35."

The Court in that case use the following language: "The 35th and 39th sections having for the first time set up a rule by which certain payments and transfers of property shall be declared void, a rule at variance with common law

and with the statutes of the States, *very properly limits and defines the circumstances within which this new rule should operate.* These are, among others, that the recipient of the bankrupt's money or property must have had reasonable cause to believe he was insolvent, *and that the transaction must have been recent.* When the bankrupt law was applied to the case of a creditor within four months, *and with the general purchaser within six months.*"

It was decided, *in re* Arledge, 1 Bankrupt Reg. 195, that "an assignment made *bona fide* twelve months prior to the filing of the petition for bankruptcy is good against the assignee of bankrupts: the assignees, except in cases of fraud, take only such rights as the bankrupt had and could himself claim at the time of his bankruptcy."

In the light of these decisions, we think we can safely say that at the commencement of proceedings in bankruptcy against the Bogens and Mueller, there was no title in the bankrupts to be vested in their assignee; that even, if said deed of assignment of December 3, 1873, was at the time of its execution and delivery voidable, and subject to the contingency of being made void by the commencement of proceedings in bankruptcy within six months after its execution, it has matured into an absolute and indefeasible conveyance; it has passed the period of contingency; it has existed for such a length of time as frees it from the operation of the bankrupt law.

Before quitting this part of the argument, we wish to refer to two questions raised in the argument of the case below. 1. As to when the deed of trust in this case took effect; and, 2. When the proceedings in bankruptcy were commenced in contemplation of law?

1. The deed of trust was duly executed according to the laws of Ohio, and was delivered by the grantors to the trustees named in the deed, on the 3d day of December, 1873, and was accepted by them. This, we think, worked an immediate transfer of the title from the grantors to the trustees. The rule, in such cases, is thus stated by Burrill on Assignments, 347: "An assignment to a trustee for

creditors, when it is delivered by the assignor into the hands of the assignee, and is at once accepted by the latter, becomes immediately operative and takes effect as a transfer of the property." This has always been understood to be the law in Ohio. A judgment will not attach as a lien on assigned real estate after the date of the execution and delivery of the deed, nor could an attachment or execution be levied on the property included in the deed.

The statute governing the mode of administering assignments in trust for the benefit of creditors does not require the deed of assignment to be filed immediately on its execution and delivery. The assignee is allowed ten days within which to file it. Nor does the statute limit the operation of the deed to the date of filing. It leaves that to the operation of the general principles of law. Our statutes nowhere declare a deed of trust for the benefit of creditors void for failure of the trustee to comply with the provisions of the act regulating the mode of administering assignments for the benefit of creditors. And, under the laws of Ohio, such a deed would be valid if never filed in the Probate Court, provided it is made in good faith, and possession is taken under it. The purpose of the statute is to support and enforce the trust. If the trustee refuses to execute the trust, or to file the deed, or to give bond, or to obey the orders of the Court, he may be removed on the application either of the assignor or a creditor, and a new trustee appointed by the Court. The trust does not fail. The statute provides for carrying it out and enforcing it. Such a thing as the failure of the trust by reason of the assignee not filing the deed in the Probate Court, or giving bond, or complying with the requirements of the law, is not contemplated by the statute.

In this respect, the statute only follows the established rules of equity, which never permit a trust to fail for want of a trustee. Much less would courts of equity permit the neglect or refusal of the trustee to destroy the rights of the beneficiaries under the deed. The trustee is merely the agent or instrument through or by whom the trusts are to

be carried out. He may die or be removed, but the trust is not thereby defeated. "It is a rule in equity to which there is no exception that a court of equity never wants a trustee. Therefore, if a trust has been properly created, and no trustee has been appointed, or having been appointed is incompetent, or has refused to accept, or has died, the trust shall not fail on that account." Tiffany & Bullard on the Law of Trusts and Trustees, 2.

But in this case it is admitted that the deed was not only duly executed and delivered to the trustees, and accepted by them, but that the trustees filed the deed in the Probate Court within the time prescribed by the law. It is true they did not file a bond immediately on depositing the deed in the Probate Court. The court did not order them so to do. Neither the assignors nor the creditors required them to do so. Any one of the creditors or the assignors had a right to compel them to comply with this requirement of the statute. They did not see proper to move in the matter.

This neglect of the Court to require the bond at the date of the filing of the deed did not render the deed void. It did not release the assignees from liability for their acts under the deed. The Court afterward required the bond, and it was given in the sum of $500,000, with approved securities. Having given bond with the approval of the Court, places matters in the same position as if it had been given at the filing of the deed. To hold this under the law of Ohio, is not going near as far as Chief Justice Chase went in the case of Charles H. Wynne above referred to, where he held that a trust deed in Virginia operated and was valid from its date (after its record), notwithstanding the law of Virginia declared such deeds "void as to creditors until and except from the time they are duly admitted to record."

In the case of *Gardner* v. *Brown*, 21 Wall. 36, it was held, that "though a statute may enact that a trustee to whom property is assigned in trust for any person, 'before entering upon the discharge of his duty, shall give bond'

for the faithful discharge of his duties, his omission to give such bond does not divest the trustee of a legal estate once regularly conveyed to him." This decision entirely covers the case under consideration.

It appears to us very clear from the language of our statute, and the authorities there cited, and from the general rules of the common law above referred to, that this deed of assignment is valid and operative from the day of its execution and delivery, on December 3, 1873.

2. As to the time when proceedings in bankruptcy were commenced.

The petition in bankruptcy against the Bogens was filed on the 22d day of June, 1874, which was more than six months after the date of the assignment, *but no order was ever entered on that petition, nor was any service of notice of the filing thereof ever made.* The reason of this, as we suppose, was because the petition was not in such form as to authorize any proceedings under it. It was filed on the day on which the amended bankrupt act was approved and took effect, which required the petition should be signed by one-fourth in number of the creditors of the bankrupt, the aggregate of whose debts shall equal one-third in amount of the debts provable against said estate. This petition stood without any amendment to it being filed or any steps being taken to prosecute it till the 1st day of August, 1874, when an amended petition conforming to the requirements of the act was filed.

The filing of this amended petition was really the commencement of proceedings in bankruptcy against the Bogens.

If the defendant in error should claim that these proceedings were commenced before the present amendments took place, it would not help him, because in the thirty-ninth section, as amended, it is provided that "if it shall appear that such number and amount have not so petitioned, the Court shall grant reasonable time, not exceeding in cases heretofore commenced twenty days, and in cases hereafter commenced ten days, within which other creditors may join

in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, *at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed.*"

This is not a case where a petition in bankruptcy has been filed, and notice to show cause served, but the adjudication has been delayed by reason of opposition, or for other cause, for in such a case there is no doubt the proceedings would date from the filing. In this case, there was absolutely nothing done. A petition is filed that does not contain the proper or necessary allegations to authorize the Court to act on it. The Court never did act on that petition. The petition in fact was a nullity, and was so treated by the petitioner and by the Court. It remained on the docket of the Court for forty days without any steps being taken to even get service on it. If such a "filing" constitutes the commencement of proceedings in bankruptcy, a petition could be filed by one or more creditors and permitted to sleep for a year or longer, at the pleasure of the petitioners, and then they can have service made under it, and make it relate back to the filing, notwithstanding the bankrupt, and persons dealing with him, had no notice.

The bankrupt act does not favor or tolerate such delays. In addition to the direction in the 39th section, to dismiss the petition, if the requirements of the statute are not complied with within the time limited, it is provided also in the 40th section that, on failure to comply within the time specified above, the Court shall dismiss the proceedings and (in cases commenced after the passage of the act) with costs. The longest time allowed after the return of the notice to show cause, is twenty days. Here nothing is done for forty days after the petition is filed. No effort is made to prosecute the proceedings. No notice is given.

All controversy on this point, however, we think is settled by the express language of the 38th section of the bankrupt law, which provides: "That the filing of a peti-

tion for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, *upon which an order may be issued* by the Court or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act." Applying this rule to the case in hand, it appears to us that said proceedings can not relate back further than August 1, 1874, when the amended petition was filed. The amended petition is the one upon which an order was issued, and the only one. If the petitioning creditors had caused notice to be served on the original petition, and then applied to Court under the 39th section for "reasonable time" within which other creditors might join in such petition, the case would have been different. Then no doubt the 22d of June would have been the date of the commencement of proceedings. But that course was not pursued. Without taking any steps under the provisions of the 39th section, the petition is permitted to sleep till the 1st of August, when a *new petition* is filed and proceedings had under it, which resulted in an adjudication by default. The petition filed on August 1st, is called an amended petition, but is in effect and in law, as it appears to us, an original petition.

To hold that these proceedings should relate back to the 22d day of June, 1874, would violate all the established rules of determining the date of the commencement of proceedings in courts.

We therefore submit that the filing of the amended supplemental petition on August 1st, 1874, was the commencement of proceedings in bankruptcy, and that the operation of the statute is limited to transactions that took place within six months from that date; and that the deed of trust of December 3d, 1873, is not within the purview of the act.

The defendant in error claims, however, that the limitation established by the bankrupt act, does not apply to this case; that it applies only to preferences and *positive frauds*. And therefore, because this deed of trust is not a

fraud or preference, it is avoided, notwithstanding more than six months had passed before commencing proceedings in bankruptcy. This would be a most remarkable construction to be placed on an act of Congress. It would present the singular spectacle of a dishonest and unjust act committed six months before the filing of the petition in bankruptcy being upheld while an honest, praiseworthy and just transaction is annulled, and all rights acquired under it are forfeited. Such a construction would tend to encourage debtors to commit frauds, and make preference, rather than distribute their property equally among their creditors. So monstrous a construction of the bankrupt act it seems to us can not be sustained.

It was suggested on the trial of this case below, that inasmuch as the trustees under the deed of December 3, 1873, held the property in controversy in trust for the creditors of said Bogens and Mueller, and the assignee in bankruptcy represented said creditors by virtue of his appointment as assignee in bankruptcy, he therefore had a right to have the property delivered to him as agent or representative of the creditors. This we deny; because no such right is vested in the assignee in bankrupty by the statute. All that he takes is such estate, rights, and property as the bankrupts themselves had at the commencement of proceedings in bankruptcy, and such property as they had conveyed in fraud of creditors, and such as had been disposed of *within six months* before the commencement of bankrupt proceedings contrary to the provisions of the bankrupt law.

Besides, even granting that the assignee in bankruptcy represents the creditors, that would not give him a right to the possession of the property, for the creditors themselves had no right to the possession of it. They had a right to compel the trustees to execute the trusts declared in the deed, but they had no right to the possession of the property: that was given exclusively to the trustees.

Again, the claim of the defendant in error amounts to a demand to have the deed of trust set aside and annulled,

and nothing more; because he does not ask to have the trusts enforced, but to have the property itself delivered to him that he may dispose of it, which can not be done without avoiding the deed of trust.

This is in direct contravention of the positive provisions of the statute limiting its operation to conveyances made within six months before the filing of the petition in bankruptcy.

In conclusion, we respectfully submit that the facts disclosed by the record in this case will not sustain an action of replevin, and that the Court below erred in sustaining the demurrer. And we ask the Court to reverse the judgment of the Circuit Court.

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WM. T. FORREST,
Attorneys for Plaintiffs in Error.

The Supreme Court of the United States.

FREDERICK J. MAYER and SETH EVANS, Assignees under the laws of Ohio of GEORGE BOGEN & SON, and G. & J. BOGEN,

Plaintiffs in Error.

vs.

MAX HELLMAN, Assignee in Bankruptcy of said GEORGE BOGEN & SON, and G. & J. BOGEN, as partners and as individuals.

Defendant in Error.

IN REPLEVIN.

Reply of Plaintiffs in Error.

W. T. FORREST,

Of Counsel for Plaintiffs in Error.

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IN REPLEVIN.

Reply of Plaintiffs in Error.

This Court, in Tiffany vs. Lucas, announced that "clearly *all* sales are not forbidden. "It would be *absurd* to suppose Congress intended to "set the seal of condemnation on every transaction of "the bankrupt. * * * without regard to its character. "A policy leading to such a result would be an ex- "cellent contrivance for paralyzing business and can "not be imputed to Congress without an *express declara-* "*tion to that effect.* The interdiction applies to sales "for a fraudulent object; not to those with an honest purpose. * * * *." This I regard as conclusive of the principal question in this case, and the recent cases

15 Wallace, 421.

of Clark vs. Iselin and Michaels vs. Post certainly sustain the position taken in this case by the Plaintiffs in Error.

The principal question in this case in my judgment, is whether the assignee in bankruptcy, can take other property than that conveyed to him by the register under the provisions of Section 14 of the Bankrupt Act, viz: "*And be it further enacted*, That as soon as "said Assignee is appointed and qualified, the judge, "or where there is no opposing interest, the register, "shall, by an instrument under his hand, assign and "convey to the assignee, all the estate, real and "personal, of the bankrupt, with all his deeds, books "and papers relating thereto, and such assignment "shall relate back to the commencement of said pro- "ceedings in bankruptcy, *and thereupon, by operation of* "*law, the title to all such property and estate, both real* "*and personal, shall vest in said assignee*, although the "same is then attached on mesne process as the pro- "perty of the debtor, and shall dissolve any such "attachment made within four months next preceding "the commencement of said proceedings." If the Bogens had parted with their property, real and personal, for a sufficient consideration, in good faith, none of the property, thus alienated, passed to Max Hellman, assignee in bankruptcy by the instrument executed by the register, which, by law, purports to "assign and convey to the assignee, all the estate, real

"and personal of the bankrupt &c." If the bankrupts, at the date of the commencement of the proceedings in bankruptcy, had no estate in the property conveyed by them to the trustees, December 3rd, 1873, the assignee in bankruptcy could be vested with no interest in it—nothing was conveyed except that which was either in the possession of the bankrupts or which in fraud of the provisions of the act had been disposed of. It is not even *pretended*, that the deed of trust executed by the Bogens was fraudulent; all admit that it was executed at the instance of the creditors and was fair and bona fide. It will not be denied, that the deed of trust of December 3rd, 1873 invested F. J. Mayer, Seth Evans and Max Hellman, as trustees, with rights of property, of which they could not have been divested by any act of their grantors; in equity, the creditors becam einterested in the property, and Mayer, Evans and Hellman were trustees for them, holding the legal title for their benefit, and neither the Bogens nor Mueller could disturb that possession, thus lawfully acquired. Unless, therefore, the Bankrupt Act can be construed so as to work a forfeiture of estates—a confiscation of property—the trustees are still possessed of rights which are vested and which should and will be protected; and the decisions of this Court are and have been in close accord with this view.

Clark vs. Iselin. 21 Wallace, 369.

"In Cook vs. Tullis, 18 Wallace, 332, we "held that there is nothing in the bank- "rupt law which prevents an insolvent

"from dealing with his property—selling or exchang-
"ing it for other property—at any time before pro-
"ceedings in bankruptcy, by or against him, are taken,
"provided such dealing be conducted without any
"purpose to delay or defraud his creditors or to give
"preference to any one and does not impair the value
"of his estate. The same doctrine was asserted in its
"fullest extent in Tiffany vs. Boatman's Savings In-
"stitution, 18 Wallace, 375."

Michael vs. Post; 21 Wallace, 429.

"Preferences, as well as fraudulent convey-
"ances, if made within four months before
"the filing of the petition, by or against
"the bankrupt, are forbidden by the Bankrupt Act;
"but three things must concur in order that the
"transaction may come within the prohibition and be
"affected by it as an illegal payment, security or
"*transfer*; (1.) That the payment, pledge, assign-
"ment, transfer, or conveyance was made by the bank-
"rupt within the period mentioned and with a view to
"give a preference to one or more of his creditors or
"to a person having a claim against him, or who was
"under some liability on his account. (2.) That the
"person making the payment, pledge, assignment,
"transfer or conveyance was insolvent, or in contempla-
"tion of insolvency at the time the preference was
"secured. (3.) That the person receiving such pay-
"ment, pledge, assignment, transfer or conveyance or
"to be benefited thereby, had reasonable cause to

"believe that the person was insolvent and that the "payment, pledge, assignment, transfer or conveyance "was made in fraud of the provisions of the Bankrupt "Act. Wager vs. Hall, 16 Wallace 595. Scammon "vs. Cole, 5 National Bankruptcy Register, 259."

Clark vs. Iselin
21 Wallace 375.

"We say these things must concur. And "they must concur, not only in fact but "in time also. *The words of the 35th "Section admit of no other construction.* The debtor "must be insolvent or comtemplating insolvency *when* "the alleged preference is given. And he must *then* "have in view giving a preference. * * * *. In fine "there must be guilty collusion to constitute the "fraudulent preference condemned by the Statute." Our opponents do not pretend to claim—it does not appear on the record—and cannot be shown that these three requisites concur in this case. It cannot be denied that on the 3rd of December, 1873, the Bogens and Mueller by the trust deed of that date, intended to and did convey the property therein described. That deed, to all intents and purposes divested the Bogens and Mueller, and invested the trustees with all the proprietory rights the Bogens and Mueller held in the property described in the conveyance. The Bogens and Mueller could not have maintained replevin for the personal effects, nor ejectment for the realty; their interest was finally and forever gone. It may be claimed that there still remained, in equity, a contin-

gent remainder over to the Bogens and Mueller. That, after the claims of all the creditors were satisfied whatever remained (if anything) belonged to the grantors is unquestionably true, and the admission of the truth of that proposition, it appears to me, makes our position still more impregnable, for the trustees may, in that view of the case, be regarded as the holders of an equitable mortgage made more than six months before the commencement of the proceedings in bankruptcy, a mortgage of unquestioned integrity, and a lien which all the authorities concur in upholding. Had the Bogens and Mueller *voluntarily* applied for the benefit of the provisions of the Bankrupt Law, could such an act have had the force and effect of rendering nugatory their solemn deed of trust (made six months before) and take the property out of the hands of trustees appointed by them and their creditors? It appears to me a negative answer is inevitable. If this position be correct, by what trick of legerdemain, can any number of their creditors, take from those non-concurring, a security they hold for the payment of their debts? Concede that the Bogens and Mueller by the deed of December 3rd, 1873, divested themselves of title, does it not then follow, that, on the 22nd of June, 1874, when the petition in bankruptcy was filed, the Bogens and Mueller had no property or right of property or possession in the estate (real and personal) which on the 3rd of December, 1873, had become

vested in the trustees? and the assignee in bankruptcy can have no *greater* or *better* right than the bankrupts themselves possessed. The interpretation of the United States District Court for the Southern District of Georgia in re George H. Arlidge.

1st. Bankrupt Register 195.

Was in consonance with this view, and no contrary decision has been made, to my knowledge. If this position be correct it is conclusive of this case.

We deny the statements in the brief of the defendant, relative to the part played by the trustees in the scramble for the office of assignee in bankruptcy; but if these statements were true, they could scarcely affect the legal status of the case at bar.

But does it follow that because the Bogens were adjudicated bankrupts, as of the 22nd of June, 1874, that the property of which they had divested themselves, December 3rd, 1873, should, by operation of law, go to the assignee in bankruptcy? I can not agree that such is the result. It may be (and indeed such is the fact) *that new obligations were contracted by the Bogens between the 3rd day of December, 1873, and the adjudication of bankruptcy*, and it is clear that manifest injustice would be done the creditors claiming under the deed of trust, *by admitting creditors to share in the proceeds of the trust fund, who could have given no credit upon the faith that the Bogens had the property which they conveyed to the*

Trustees, December 3rd, 1873, and whose goods, means and money in no wise contributed to increase that fund. It is publicly notorious that the Bogens did carry on business from December 3rd, 1873, up to the time of the filing of the petition in bankruptcy, and how are those creditors whose claims accrued between the 3rd. of December, 1873 and June 22nd, 1874 to be excluded from participating in the fund, if the estate is to be taken from the trustees and given to the assignee in bankruptcy.

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Supreme Court of United States.

OCTOBER TERM, 1875.

Frederick F. Mayer and Seth Evans, Assignees under the Laws of Ohio of George Bogen & Son, and G. & F. Bogen,

Plaintiffs in Error,

vs.

Max Hellman, Assignee in Bankruptcy of said George Bogen & Son, and G. & F. Bogen, as partners, and as individuals,

Defendant in Error.

IN BANKRUPTCY.

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Supreme Court of United States.

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Defendant in Error.

IN BANKRUPTCY.

BRIEF FOR DEFENDANT IN ERROR.

This suit was instituted in the Circuit Court of the United States for the Southern District of Ohio, on the 24th day of September, 1874, to recover possession of the personal estate and property claimed to be held by the plaintiffs in error, as assignees of the said bankrupts, under the insolvent laws of Ohio. Under the order of delivery issued in the case, all the personal estate was obtained, except about $30,000 in money, and other items of property unascertained—all of which, however, is, by agreement in writing between the parties, to be governed by the final

decision in this proceeding. In addition to this personal estate, a large amount of valuable real estate yet remains in the possession of the plaintiffs in error, and other assets in their hands, which will also be governed by the terms of said agreement, and by the effect of the final decision herein, and the said agreement is a part of the record.

On the 22d day of October, 1874, the plaintiffs in error filed their joint answer to the said petition below, setting forth in substance that the said estate and property had been duly assigned to them by the bankrupts, by the virtue of a deed of assignment executed pursuant to the insolvent laws of Ohio, for the benefit of creditors, on the 3d day of December, 1873, and under which they, on the 21st day of January, 1874, in the Probate Court of Hamilton county, Ohio, executed bond as such assignees in the sum of $500,000. The plaintiffs in error further claim that said assignment to them was made in good faith, and more than six months prior to the filing of the petition by the creditors against said bankrupts for adjudication; that their possession and administration of said estate can not be disturbed by the bankrupt act, and that the defendant in error, as assignee in bankruptcy, is not entitled to divest them of the same.

To this answer the plaintiff below filed a general demurrer, and the questions involved were fully presented by counsel, and considered by the Court, which sustained the demurrer, and entered judgment in favor of Max Hellman, assignee in bankruptcy, for all the property recovered under the writ of replevin, and for $31,000 in money, which said Mayer and Evans had refused to deliver under the writ to the marshal. To this judgment the plaintiffs in error herein excepted, and prosecute this proceeding in this Court thereon. The plaintiffs in error claim that five distinct questions arise on the record in this case, but we contend that none of these, as put by their counsel (and in the form stated), are really involved in the proceeding. The first question stated can not arise in any event, because the premises stated by counsel do not exist in the record. They ask, "Can one of several persons in joint possession of personal property under an express

trust, maintain replevin against his co-trustees?" It is admitted that the defendant in error in this proceeding acts in the capacity of assignee in bankruptcy, while the plaintiffs in error claim to act only as assignees under the laws of Ohio, and they therefore, *as such, can not be in joint possession*, nor can they be *co-trustees*. The defendant in error is a trustee elected by *the creditors in bankruptcy*, and thereupon appointed and qualified by the *District Court of the United States for the Southern District of Ohio*, while the plaintiffs in error were *appointed* by the *debtors* themselves, under the *deed of assignment made pursuant to the statutes of Ohio.*

They are therefore relatively *strangers* to each other as trustees, and the defendant in error, as trustee in bankruptcy, can no more be said to be co-trustee of the plaintiffs in error in this proceeding than could any other person who might have been appointed assignee in bankruptcy. The two trustees obtain from different agencies, created for different purposes, and authorized only by different laws. We repeat, therefore, that this question is not involved here, and the arguments made thereon by counsel have nothing to rest upon, aside from their inherent untenability. It is not true in fact, nor does the record show, that Max Hellman individually, Max Hellman as assignee under the assignment laws of Ohio, or Max Hellman assignee in bankruptcy, was in possession of the property in controversy at the commencement of this proceeding. The record discloses quite the contrary, for the return of the marshal under the writ of replevin shows that the property was taken from the possession of the plaintiffs in error, and delivered over to the defendant in error upon his having executed the required bond. But suppose that Max Hellman, as assignee, appointed by virtue of the deed of assignment under the laws of Ohio, might be considered as having been in *constructive* possession, could he, as *assignee in bankruptcy*, be prejudiced thereby? As such assignee in bankruptcy, his *new* trusteeship became distinct, and his privileges and responsibilities wholly changed, *as much so* as though he had never been named by the debtors in the deed of assignment.

He sustains the same position in this proceeding as any other third person would occupy who might have been elected assignee in bankruptcy. It is not the *individual*, but the *trustee*, who represents the estate in bankruptcy, and whether his *name* be Max Hellman or any other, his relations as assignee in bankruptcy to the assignees under the deed of assignment are without any affinity, and he can not, in any sense, be termed a *co-trustee*. From our theory it was unnecessary, and indeed impossible, that Max Hellman should formally resign his alleged trusteeship, for the adjudication in bankruptcy, and his appointment as assignee thereunder, *completely suspended* the State assignment and the *further operation* of the deed under which he and the plaintiffs in error had formerly been acting, and there was nothing for him to resign from, if our position here is correct. *There can not be at the same time two different sets of trustees over the same property and rights.* One must certainly yield to the other and it is for this Court to determine whether the assignees deriving their powers from the acts of Congress or those obtaining their authority from the legislature of a State shall be upheld. In referenee to the present objection to the form of this proceeding, we have but to say that we regard it unnecessary to discuss that question at all. The plaintiffs in error filed their answer to the petition below, and took no objection or exception to its form by demurrer or otherwise, and the question can therefore neither be raised under the pleadings nor be involved in the record. *In re Alansom M. Clarke*, 9 Blatchford Circuit Court, 379.

In reference to the question of the *effect* of the *adjudication* in bankruptcy upon the deed of assignment, and the proceedings thereunder, we shall have further to say hereafter; but we now desire, under this head, only to add that it does not require a separate judicial finding in a court of equity vacating a deed of assignment, when the assignment proceedings, under the State laws, are *suspended* and *avoided* by virtue of the adjudication in bankruptcy, which itself works such a result, as the Circuit Court below held in this case, and as we shall endeavor to show has been the universal finding of the courts of the United States.

If the adjudication in bankruptcy completely suspends the proceedings under the State laws, as was held by the Court below herein, then the right of possession becomes immediate in the assignee in bankruptcy; for no adverse party has the lawful power to detain such possession of the bankrupt's estate from him, and the assignee in bankruptcy may assert his rights at once, for the powers of the State assignees are completely superseded. There is no other form of remedy to recover such possession from persons having no lawful right to withold, than the mode herein adopted, and the record shows that our learned friends, by their proceedings after the filing of the petition below, conceded this.

The adjudication which rendered the Bogens bankrupt brought them and their estate within the purview of the bankrupt act, and they having been properly adjudged bankrupt, it made no difference in whose nominal, technical, or trust possession their estate was, it became subject to be controlled and distributed as provided by the act of bankruptcy, and not by the assignment laws of the State, which had been superseded thereby.

In answer to the other propositions presented by our learned friends in their brief, we have to say that we contend that the defendant in error alone, as the assignee in bankruptcy, is entitled and authorized to possess and administer the estate for the benefit of the creditors, and only in pursuance of the provisions of the bankrupt act, by virtue of the adjudication in bankruptcy against the bankrupts, can their affairs be lawfully settled.

In the situation as presented, it is evident that a *conflict* of *jurisdiction* and *authority* has arisen between the Court in bankruptcy and the Probate Court of Hamilton county, Ohio, and the propositions arising on the record, and the real issues existing in this proceeding, as we understand them, we will endeavor now to present and discuss. The main issues which this Court is called upon to determine, are whether the estate of the bankrupt shall be administered in accordance with the provisions of the bankrupt act by the District Court of the United States, or whether the same can only be administered pursuant to the as-

signment laws of Ohio; and by the Probate Court of Hamilton County, Ohio; whether, in the conflict thus arising, *the State laws must yield* to the *supremacy of the national legislation*, or whether the *same persons*, *creditors*, and *debtors*, the *same rights* and *interests* brought within the purview of the bankrupt law, must be governed by the laws of the State?

The adjudication of bankruptcy had the effect of *completely suspending* the *further operation* of the State assignment laws, under which the plaintiffs in error claim to be acting as trustees, and so, as we before stated, the Court below held in this case, following the precedents established by the Supreme Court of the United States from the earliest construction of the bankrupt acts by Chief Justice Marshall to the present day, the various authorities of which we shall have occasion to cite hereafter.

The very first provision of the present bankrupt act, defining the jurisdiction of the United States Courts, seems alone decisive of the question.

Section 1 provides as follows:

"*And the jurisdiction hereby conferred shall extend to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of* ALL PARTIES, AND TO THE MARSHALING AND DISPOSITION OF THE DIFFERENT FUNDS AND ASSETS, SO AS TO SECURE THE RIGHTS OF ALL PARTIES AND THE DUE DISTRIBUTION OF THE ASSETS AMONG ALL THE CREDITORS."

Now, this jurisdiction thus conferred can not be *concurrent* with the jurisdiction of the State Courts which administer the assignment laws, being in their nature of like import. Both jurisdictions can not be exercised at the same time, and the jurisdiction must be exclusive in that court which should and can only lawfully administer the estate and adjust the bankrupt's affairs. We would ask, then, how can the jurisdiction thus conferred by the bankrupt act upon the District Court of the United States be at all exercised, when the estate and assets are in the possession of assignees appointed by the debtors and by the

State Court, and acting under its system of administration? The bankrupts and their creditors, by virtue of the adjudication of bankruptcy, are certainly rendered amenable to the provisions of the bankrupt act administered by the courts of the United States. Why not the assets and property of the bankrupts? Shall one court have jurisdiction over the *persons* and the other over the *property?* There could be no consistency in such a position and no harmony in the administration of the respective systems. The plaintiffs in error are obliged to recognize the exclusive and supreme authority of the Court in bankruptcy in the control of the property and affairs of the bankrupts. The parties who made the assignment to them, under the laws of Ohio, have been adjudged bankrupts by the laws of the United States, and the trust is at an end, for the District Court of the United States carrying out the provisions of the bankrupt act, has appointed a *new* trustee clothed with all the powers conferred by the bankrupt act. But these plaintiffs in error ask this Court to continue in their hands the possession and administration of the estate and keep alive the authority derived by virtue alone of the powers of the State. The plaintiffs in error must acknowledge the inferior jurisdiction and powers of the Court from whence they derive authority, knowing, as they do, that the State Court could interpose no objection to the authority of the courts of the United States, even if they went so far as to deprive them wholly of the possession of the estate.

We would ask how the District Court in bankruptcy could "*marshal and dispose of the different funds and assets so as to secure the rights of all parties and the due distribution of the assets among all the creditors, as provided in said section 1,*" without conflict and disaster, if the State assignees are permitted to continue in the possession and administration of the estate.

The plaintiffs in error complain that, as there is no mention in the bankrupt law of assignments in trust for the benefit of creditors in State Courts, such assignment ought not to be superseded. But they do not appreciate the *force* and *effect* of the bankrupt act itself upon such general assignments. In England, from

whence our system of bankruptcy is mainly derived, the force and effect of the adjudication completely suspended all other like administrations, and when the first occasion under the bankrupt act in this country, under the laws of 1800 and 1841, were presented, the question was determined by this Court, and every subordinate Court has ever since followed the same doctrine. In the leading case on the subject—*i. e.*, *Sturges* vs. *Crowinshield*, 4 Wheat. 122—in which Chief Justice Marshall pronounced the opinion of the Court, the force and effect of the bankrupt act upon such State assignment laws was so reorganized and determined.

This Court in that case declared as follows:

"*When Congress passed a bankrupt act, it was supreme, and the State laws must yield to it, and the latter could no longer operate upon persons or cases within the purview of such bankrupt act. The enactment of such an act suspended the State laws on the same subject, and created a disability in the States to exercise powers of the like nature.*"

Again, in the case of *Ogden* vs. *Sanders*, 12 Wheaton, 213–314, the same principle was fully recognized and affirmed. In the case of *Griswold* vs. *Pratt*, 9 Met., the Court considered the question:

"Whether the enactment of a bankrupt law does, *ipso facto suspend* and *abrogate*, during the continuance of such law, all general insolvent laws of the several States, so far as they have reference and are applicable to the *same persons* and *the same assets*, as are made subject to the proceeding under the bankrupt law."

In that case it was expressly decided that the bankrupt law *suspends* the State law, and that the "*two systems can not stand together.*" So it has been held in Maryland, in the case of *Larrabee* vs. *Talbot*, 5 Gill, 426.

This *force* and *effect* of the bankrupt law upon the assignment laws, was again recognized and settled in Louisiana; where the assignment laws are similar in character to those of Ohio.

The same doctrine announced by the Supreme Court of the

United States, was again affirmed in that State, and the Court, in deciding the question employed this most positive language:

"*This power was specially delegated to Congress, and only reserved by the several States in so far and so long as Congress did not see fit to exercise it. The moment they exercised the power, the State laws upon the subject became inoperative, and were suspended.*"

Again, the same doctrine was held, as reported in the Law Register for October, 1867, p. 765, by the District Court of the United States, Eastern District of Pennsylvania.

If there should be any doubt upon the subject, it is certainly dispelled by the learned opinion of the court, Story, J., in *Ex parte Lucius Eames*, 2 Story, Circuit Court of United States 322. The Court say, in that case, that—

"*As soon as the bankrupt act went into operation, it, ipso facto, suspended all action upon cases arising under the State insolvent laws, where the insolvent persons are within the purview of the bankrupt act.*"

The Court went further and said: "*That both systems could not be in operation or apply at the same time to the same persons, and where the state and national legislation, upon the same subjects and the same persons, came in conflict, the national laws must prevail and suspend the operation of the state laws.*"

And the Court cited the authority of Chief Justice Marshall in *Sturges* vs. *Crowninshield*, and the conclusions of the Court in *Ogden* vs. *Sanders*, and reviewed the other authorities.

The opinion of the Court in the Eames case concludes as follows:

"It seems to me, therefore, that nothing remains upon which *an argument can be founded*, that *the insolvent laws of Massachusetts* are not, as to *persons and cases*, within the provisions of the bankrupt act, *completely suspended. Each system is to act upon the same subject-matter, upon the same property, upon the same rights, upon the same persons, creditors as well as debtors, both can not go on together without direct positive collision; and the moment the bankrupt act does or may act upon*

the person or the case, that moment it virtually supersedes all State legislation."

This doctrine, however, has not been lost sight of in the present system of bankruptcy, and whenever the question has been fairly presented under the bankrupt act now in force, the same effect has been given to it by the courts of the United States. The most important case, perhaps, arising under the bankrupt act of 1867, in which this question was involved, is the case reported in National Bankruptcy Register, vol. 9, p. 50, United States Circuit Court, Rhode Island, *In re Reynolds.* In this case, all the authorities bearing on the subject are reviewed commencing with *Sturges* vs. *Crowninshield*, and with profound reasoning, the court, Bradley, C. J., concludes the opinion:

"*That the passage of a bankrupt law for the United States suspends the State insolvent law in force at the time of its passage, as far as the provisions of the bankrupt law cover the subject-matter of the provisions of the insolvent law.*"

This case arose, and was decided too, since the recent amendments to the bankrupt act, and the interests therein involved and the questions determined, are identical with those in controversy in the case at bar.

Whatever is or may be contemplated by these laws of the State, in their operation upon persons, property, and rights, are covered by the provisions of the bankrupt act whenever the same matters and things are or may be brought within its purview.

Looking at the subject, however, from the technical standpoint, as urged by the plaintiffs in error; they held only the possession of the estate as trustees or assignees, for the benefit of the creditors of the bankrupts. The strongest title which they could claim, is that of *trustees for the benefit of the creditors*, which constitutes the creditors the *cestuis que trust.* In other words, the creditors of the bankrupts were, at and before the adjudication of the bankruptcy, and have ever since been, and always will be, until the final winding up of the affairs and as-

sets of the bankrupts, the equitable owners of all the property held by the plaintiffs in error. Their possession is merely a trust, created and existing for a definite and specified purpose—*i. e. for the benefit of creditors, the same creditors represented by defendant in error.* Immediately upon the election of the defendant in error, *by operation of law* he became the *representative*, not only of the *bankrupts*, but of *all their creditors.* Thus a *new* trust was created at *the instance of the creditors*, and *by virtue of the bankrupt act* of the United States. The trust created in the plaintiffs in error was one obtaining *solely from the bankrupts*, and by virtue of the laws of the State of Ohio. A conflict thereby arose of jurisdiction, authority, and title, and the question became involved, whether the supremest power in the land, and the authority of those who exclusively are *the beneficiaries of the trust*, could be subordinated to the laws of a State, and the authority of the bankrupts, who have *now* neither *legal* nor *equitable* interest in the estate. The defendant in error was created assignee, *in contemplation of the bankrupt act*, if not in fact, of *all the creditors* of the bankrupts, the *cestuis que trust* of the estate, in the possession of plaintiffs in error, who were appointed assignees by the bankrupts, and in that choice *the creditors had no voice.*

The effect of the adjudication in bankruptcy, and the election of the defendant in error as assignee, operated as a unanimous calling of the *cestuis que trust* of said estate upon the trustees who held the same, to surrender the estate into their hands, or into the hands of their legal representative—the assignee in bankruptcy. Adopting the language of counsel for plaintiff in error—viz.: "The object of the bankrupt act was to secure a fair and equal division of the debtor's property among all his creditors"—we can not see how, *within the intent and meaning* of the bankrupt act, such object can be obtained without the relinquishment of that jurisdiction and supervision which the bankrupt act requires. The *cestuis que trust* of all said estate have, by the proceedings in bankruptcy, *chosen the forum* where all matters pertaining to the administration of the bankrupt affairs

and the adjustment and division of the estate and property shall be had.

It is evident that BOTH SYSTEMS CAN NOT CONTINUE WITHOUT CONFLICT. WHICH SHALL YIELD? Shall the supreme power to which the State of Ohio, with all the States, has delegated all its like powers, continue in this conflict the exercise of its *administration* over the debtor and creditor, the property and the interests involved, and that, too, when all the beneficiaries of the estate have decreed otherwise? It is admitted by the argument of counsel that transactions which are fraudulent, and estates which are fraudulently transferred, may be reached by the bankrupt act, and *such property* recovered by the assignee in bankruptcy. Can it be seriously contended. then, that the assignee in bankruptcy shall administer upon the property and estate *fraudulently conveyed only*, and the assignees, under the State laws, administer upon the estate *which has not thus been conveyed?* In such a dilemma, the assignee in bankruptcy could have possession of *one* part of the bankrupt's estate, and the assignee under the State laws could have charge of *another* part of the *same* estate.

Thus a recognition of *joint* and *several* title and responsibility between the assignees might be assumed and had, and they amenable only to the courts from which they severally derive authority. If the doctrine claimed by counsel can be maintained, the courts of the United States are powerless in the exercise of that wholesome and uniform supervision over the estate and affairs of bankrupts which is contemplated by the bankrupt act. The courts of the United States *could have no direction in the sale or disposition of the property*, nor could the machinery of he bankrupt law be put in operation, *for want even of means from the estate* to execute its provisions, orders and mandates. The title acquired by virtue of the assignment laws in the defendants is merely technical, and whenever the power of the bankrupt act is exercised, the trust in the hands of the assignees is shifted to the assignee in bankruptcy. This title is not such when the bankrupt power hangs over it, as must be divested by

the ordinary remedies applicable in other cases. It is true that to the law it is commendable that an insolvent debtor shall turn over his property for the equal benefit of all his creditors, nor have any restrictions on such dispositions been placed by the constitution or by the acts of Congress. Such dispositions remain in force until *superseded* by a *higher* law contemplating *like* administration. The claim that we make in nowise disturbs such recognition, but confirms it; for the bankrupt law requires the *same* disposition and has the *same* effect when the *same* persons and property come within its purview. It becomes then a question merely of jurisdiction. The silence of the bankrupt act in reference to assignments in trust for the benefit of creditors, is significant only because it is not necessary that the powers of the Court in bankruptcy need be invoked against such trust, for the *effect* of the adjudication itself works, and must *operate a suspension* of the *functions* of the assigmnent court, in order that its provisions can at all be carried out. The argument of counsel seems to be based solely upon the idea that this *construction*, and this *force* and *effect* of the bankrupt laws upon the State laws, would require the assumption that these State insolvent or assignment laws, and the deeds of assignment thereunder made, are *invalid*. This is evading the true theory, and is not the light in which either the bankrupt act or the decisions of the courts of the United States have viewed the subject. The State insolvent laws, and the assignments made by virtue thereof, need not be regarded *invalid*, for that would mean that they had *no validity*, and were *void* in the beginning.

So long as the power is not exercised by Congress, conferred by the constitution by creating a "uniform system of bankruptcy throughout the United States," and so long even after the creation of such a uniform system of bankruptcy that its powers are not called into requisition, and not *applied* to the particular persons and cases, the *validity* of the State insolvent laws and the assignments for the benefit of creditors *need* not be questioned or disturbed.

They will remain operative until they become *suspended* or

abrogated by higher laws of *like* or *greater* import and having the *same* and *greater* interests in view, and to operate uniformly in all cases and in all States throughout the Union. The short life of the bankrupt act of 1871 was not owing either to the character of its provisions or to the construction of its effect upon State insolvent laws, or upon the trade or commerce of the country.

Its brief existence was owing merely to the limited necessity of its usefulness and importance. It can not certainly be said truthfully that the act of 1841, or the present bankrupt act, may, in this relative view, be regarded as obnoxious; for the provisions of the bankrupt act, in contrast with similar provisions in insolvent laws of the States, respecting the management, disposition, recovery, distribution, and other incidents attending the settling up of the affairs and estate of the bankrupts, are more expedient, practicable, and effective in all respects, and in any event the legal presumption is, when its power is exercised, that these are its attributes. The bankrupt act was intended, and must be presumed, to afford the *best mode of administering the estate of insolvents.* It will tolerate no attempt to carry into effect some other plan inconsistent therewith. *Cookingham* vs. *Morgan*, 5 B. R. 16; 7 Blatch. 480. We can see, also, no difference between the provisions of the present bankrupt act and that of 1841 in this respect, nor in the relative *force* and *effect* which the act now in force has upon the insolvent laws of the States.

For the purpose of this case, it is not necessary to contend that either the present or the former bankrupt act are rendered general assignments for the benefit of creditors absolutely *void;* but merely that when such assignment exists, and the powers of the national law *are invoked* to operate upon the same persons, rights and property, the State insolvent laws, and the proceedings thereunder, are at once *suspended* and *superseded.* The provisions of section 35, of the present act, which corresponds with the 2d section of the act of 1841, to which reference is made by the counsels for plaintiffs in error, has cer-

tainly no application whatever to assignments in trust for the benefit of creditors, under the insolvent laws of the States. *The counsel themselves admit that such assignments are nowhere mentioned in the act*, and the provisions of these sections have reference and can apply only to "*such payments, sales, assignments, transfers, or other disposition of any part* of the debtor's property, to any person for his *own* benefit," or for the benefit of a *preferred* number of creditors; but not to such disposition of *all* the debtor's property for the benefit of *all* his creditors. These sections therefore *limit the time* within which these *preferences*, conveyances, and frauds are avoided; but *assignments in trust for the benefit of all creditors*, is a direction to apply the estate to the payment of all creditors rateably, just what the bankrupt act so far itself requires; and *such assignments* must therefore be governed by the construction of the whole bankrupt act *in its general import, spirit and policy.*

The bankrnpt act is only another and higher mode exercised under *national* sanction, of carrying out similiar purpose provided by the *State* legislation, and the assignment laws of Ohio clearly purport to administer the estates of *insolvent* persons. We do not claim, as it is charged, that although the assignment of the Bogens *was* a *valid, legal*, and *fair* assignment for the benefit of *all* these creditors, that the subsequent adjudication in bankruptcy rendered the same *invalid, illegal* and *unfair;* but that it had the *effect* of *suspending* its *further* operation, as we have already repeatedly stated, and the premises therefore of the argument of the learned counsel is unfounded in fact or theory.

Our learned friends have been at great pains in advising this Court of the favor with which the bankrupt act regards *bona fide assignments in trust for the benefit of creditors;* and although we attach little importance to the proposition either way so far as this proceeding is concerned, we deem it proper to present a few suggestions. We all know that the debtors in this case have been duly adjudged bankrupt, and whether an assignment, such as plaintiffs in error are claiming to act under,

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is, or is not, *an act of bankruptcy*, is wholly irrelevant to this proceeding. We believe, however, that it has been almost the unanimous opinion of the courts of the United States, that an assignment for the equal benefit of all the creditors under the State laws, *however fair and bona fide*, is *per se*, an *act of bankruptcy*, upon which an adjudication in bankruptcy would be declared when the petition is filed on *that ground* within six months after the *commission of the act*. Such an assignment has been construed as necessarily *defeating* and *delaying* the operation of the bankrupt act, for it shows an intent on the debtor's part, *to assume the distribution of his property, in satisfaction of his debts*, through the agency of an assignee of *his own selection*. An assignment for the equal benefit of all creditors, *is in contravention of the spirit and policy of the bankrupt act*, although made in perfect good faith, and the authorities sustaining this construction are overwhelming. *In re S. T. Smith*, 3 B. R. 377; S. C., 4 Ben. 1; S. C.. 1 L. T. B. 147; *Anon.*, 3 B. R. 78; *Spicer et al.* vs. *Ward, et al.*, 3 B. R. 512: *Curren* vs. *Munger*, 6 B. R. 33: *In re Goldschmidt*, 3 B. R. 165; S. C., 16 Pitts. L. J. 204; *In re Randall & Sunderland*, 3 B. R. 18; S. C., Deady, 557; S. C., 2 L. T. B. 69; *Wells, et al.*, 1 B. R. 171; S. C., 1 L. T. B. 20; 7 A. L. Reg. 163; *In re Burt*, 1 Dillon, 439; *In re Henry Brenneman*, Crabbe, 456; *Harby* vs. *Clark, et al.*, 3 B. R. 385; S. C. 1 L. T. B. 151; S. C. 3 L. T. B. 11; S. C., 17 Pitts. L. J. 61; S. C., 2 C. L. N. 121; *Hardy* vs. *Binninger, et al.*, 4 B. R. 262; S. C., 7 Blatch. 262.

Adopting the opinions of the courts in these authorities, assignments for the benefit of creditors, are declared to be "*systems of administration of an insolvent's* property and estate, *of his own choosing*, and whatever may be his motives, they are immaterial. They are, when made, conclusive evidence of the debtor's inability to pay his debts, and therefore of his *insolvency*." The intention of the bankrupt act clearly is, that when a failing debtor is conscious of his inability to prosecute his business, and pay his debts, he should at once subject his property to such a disposition *as the bankrupt act has provided for*. The

property then becomes *a sacred trust for the benefit of creditors, who have a right to insist that it shall be administered, not according to the wish or preference of the insolvent, or in accordance with the insolvent laws of a State, but according to the provisions of the national bankrupt act.* Practically, an assignment defeats or delays the operation of the act. It deprives creditors of a legal right under the statute, and is clearly in contravention of its spirit and its letter. *It commits the disposition and the distribution of the property to an assignee, selected by the debtor, and deprives his creditors of the right given them by the bankrupt act to choose an assignee for that purpose; it takes from the courts of bankruptcy the legal supervision and control —the legal and equitable jurisdiction—which they, under the act, are to exercise in respect to such property, and the hostile claims and adverse interests of the creditors, and the marshaling of the debtor's assets, as well as in respect to his person, conduct, and property,* and also defeats its operation in many other respects by *preventing the property assigned from being brought within the operation and protection of numerous minor provisions of the act, and within the protection of other provisions of great importance, the infraction of which is punished criminally.* Such an assignment *necessarily and absolutely defeats the operation of the bankrupt act. The provisions of the bankrupt statute fully authorize, if they do not absolutely require, this construction.*"

We quote from the argument of counsel for plaintiffs in error: "The policy of the bankrupt law is to leave all honest, fair transactions stand, and only *avoid* certain acts specifically and particularly described in the 35th and 36th sections; that conveyances in trust for the equal benefit of all creditors are not *named* in said sections, that a proper construction of said bankrupt law does not include such conveyance, among the prohibited transactions which are made *void* by the act."

The bankrupt act does not prohibit such assignments, and all proceedings that are fairly had thereunder, up to the time of the *operation* of the bankrupt act upon the same, by the filing of

the petition and the adjudication, remain undisturbed, and indeed confirmed; but, from that time forward, all further proceedings are completely *suspended*, for the supremacy of the national act takes hold and completes the work already begun. The case of *Langley* vs. *Perry*, referred to by counsel for plaintiffs in error, has no application to the questions at issue in the case now under discussion; but if it had, it would only tend to weaken the force of their argument. The question presented by that case was whether the assignment was an *an act of bankruptcy or not*, so that, upon that *ground*, there could be no *adjudication*. The District Court of the United States, Leavitt, J., decided that the *mere assignment in trust for the benefit of creditors*, though untainted by fraud, was, *per se*, *an act of bankruptcy;* and the Circuit Court, Swayne, J., which reviewed the case and pronounced a contrary opinion, has since, as we are informed, intimated a change of opinion in accordance with what we believe is now universally held to be the law in the courts of the United States, sustaining the former opinion of Judge Leavitt. *Spicer* vs. *Peckham*, 3 Bankrupt Reg. 127.

But what application has *that question*, either way, to the issues here involved? The Bogens *were adjudicated bankrupts* upon the petition of *seventy-three creditors*, whose claims amounted to about $95,000—constituting a much greater number and amount than required under the amendment of June 22, 1874—upon *other* and *different* grounds; by which adjudication the parties, debtors, and creditors, and all interests, property, and rights yet *undisposed* of under the State proceedings, were brought within the *protection* and *subjection* of the bankrupt act, and to which adjudication *no objection* was interposed even by the plaintiffs in error themselves, who even regularly proved their claims as creditors, and, on the day fixed for the election of assignees in bankruptcy, graciously voted for themselves for the very position which the defendant in error now occupies and asserts. If they had received the appointment by the creditors, and had not been defeated, and were now the assignees in bankruptcy, who will say that such a suit as this would ever have been found necessary?

Is their present resistance to be encouraged. when such a course can not subserve the interests of the bankrupt act, or that of the *debtors* or *creditors*, but can only inure to their own *private* benefit? Their opposition can not be else than mercenary, for the controversy has naturally tied up in their hands an estate of great magnitude, and they are permitted the use of over $30,000 in cash, and the administration of the estate is clogged, as the return of the marshal shows they even *refused* to deliver, under the writ, the money in their hands, which, by the complication, they undoubtedly keep for their own private benefit; for it can not be said to be to the creditor's advantage who called the adjudication into existence.

Counsel argue that an assignment in trust for the benefit of all a debtor's creditors, is not a conveyance made with a view to prevent the property from coming to the assignee in bankruptcy, or to prevent the same from being distributed under the act. The Courts of the United States, however, have invariably given the contrary construction, as we have already shown; *and indeed the resistance of the plaintiffs in error to the claim of the assignee in bankruptcy to yield up the property to him, is conclusive evidence that they themselves regard such assignments in trust* ARE MADE *both with the view and in fact* to prevent the property from coming to the assignee in bankruptcy, *for they are now preventing the same by what they claim to be the authority of such assignment, from being distributed under the act.*

We now come to consider another objection made to the claim of the defendant in error. The objection is, that the petition in bankruptcy against the Bogens was not filed for more than six months after the execution and delivery of the deed of assignment to the plaintiffs in error. We think no better argument against this claim can be made than the admissions and arguments of counsel for plaintiff in error themselves on the other questions already presented. They have said that "*conveyances in trust for the equal benefit of all creditors* ARE NOT NAMED *in sections 35 and 39, or any other provision of the*

bankrupt act, and that such conveyances are not among the prohibited transactions which are made void by the act. . . . . That the bankrupt act much less says nothing as to deeds of trust or conveyances of an analogous character. IT LEAVES ALL MATTERS, DEEDS AND INSTRUMENTS IN WRITING, NOT SPECIALLY SAVED, TO THE GENERAL PRINCIPLE OF JURISPRUDENCE."

We fully agree with them. And yet they admit by their argument, substantially, that if the deed of assignment under which they claim had been made within six months before the filing of the petition in bankruptcy, that it would come within the purview of the bankrupt act, and would then be inoperative. *How could this be done when they are not named in the act? If such assignments are not named in the bankrupt act how can any of its limitations apply?* It is true that section 35 of the bankrupt act limits its operation to payments, sales, assignments, transfers, and conveyances, made within six months before the filing of the petition in bankruptcy. This provision, however, does not apply to *general assignments in trust for the benefit of creditors*, according to their own admission, for they agree that such assignments are not named or referred to in the act. Such dispositions contemplated by the act and limited in time, are only those which are *preferences* and *frauds* made to a person for *his* own benefit, or for the benefit of some, to the exclusion of *all* the creditors alike. Where the assignment is made *in trust* for the equal benefit of *all* creditors, the administration over the property is analogous as far as applicable to that contemplated by the bankrupt act. *It is for that reason obviously that it is suspended, when the bankrupt act is invoked, and it pronounces the adjudication.* It is *but another system* created to administer the estate and wind up the affairs of the debtor, the operation of which, for the reasons and under the authorities already suggested by us, become, *ipso facto, suspended* and *superseded* by the bankrupt act *whenever* it is called into existence. It is evident that *time* is not the *essence* of this question. If the plaintiffs in error acquired such title as they claim to the estate of the bankrupts, it must be absolute, for time could

neither enhance nor depreciate its security. If the claim thus made be correct, how could the provisions of the bankrupt act be exercised after adjudication? Its functions would cease then. How could section 43 of the act, for example, be carried out? Suppose that the creditors, in pursuance of said section, should pass the resolution therein provided and make thereunder a composition with the bankrupts.

After such composition is made, and the consideration thereof passed by the bankrupts to their creditors, would not all their estate, formerly assigned to the assignee under the assignment laws of the State, belong to the debtors, and would *they* not be entitled to recover the same from the assignee? *There can certainly be no dispute as to this*; and, if by virtue of *this innate force* of the bankrupt act, the assignees, under the assignment laws, can be divested by the *bankrupts* themselves, at any time after such composition, which in most any case would require *more than six months after* the deed of assignment had been executed, why does not the bankrupt law, of its own force and effect, divest the State assignees in favor of *all the creditors*, and in its own interest, at any time it may be called into exercise?

As has properly been said by counsel for plaintiffs in error, in the argument and brief below, such trust deeds for the benefit of creditors *are left to the general principles of jurisprudence.* It is an application of the general principles of jurisprudence, which renders the proceedings in the State assignment inoperative in this case. The bankrupt act, called into exercise by the creditors, to operate upon the same persons and property, is entitled, under all principles of law and equity, to the *preference* in the administration of the property and affairs of the bankrupt. If we are to look outside of the bankrupt act, and not within its provisions, for light upon this subject, we find, from all sources from which any construction based upon the general principles of jurisprudence has been given, that it has invariably been contrary to the claims made by defendants. Let us examine other provisions, however, of the

bankrupt act, from which these powers were actually derived, and the general principles of jurisprudence arise, applicable to to the case at bar. Again, section 14 provides: "The bankrupt is entitled to withhold or recover such property as is exempt from attachment or seizure, or levy on execution, by the *laws of the United States*," in addition to his exemptions under the State laws.

This additional exemption does not apply under the State laws, and it can not be denied that a conflict arises on that subject, as well as on many others, where the mode and manner of the administration of the estate *differs in the two systems.*

Again, section 14, provides:

"No *person* shall be entitled, *as against the assignee, to withhold from him possession* of any books of account of the bankrupt, or *claim any lien* thereon."

The alleged title of the defendants to the estate in controversy is asserted to these books of accounts, as well as to the other property, and their claim must stand or fall alike on all. The authority of this court *is never limited to administer the estate*, there having been an adjudication upon any committed act of bankruptcy under a *petition filed within the time* prescribed by the act, in order that its administration may be exercised over the affairs and estates of the bankrupts.

Section 25 of the bankrupt act is convincing that this power at all times exists, and can at any time be asserted.

The section provides as follows:

"*And* WHENEVER *it appears to the satisfaction of the Court* THAT THE TITLE TO *any portion of an estate, real or personal, which has come into the possession of the assignee,* OR WHICH IS CLAIMED BY HIM, IS IN DISPUTE, *the Court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the Court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of.*"

Now the only limitations of time prescribed by the bankrupt act are those defining the time within which a petition must be

filed for adjudication, after such acts are committed as are denominated *acts of bankruptcy* (sec. 39), and the limitations of time prescribed by the thirty-fifth section.

Whenever an adjudication is declared, however, upon any *act of* bankruptcy not barred by time, then such an adjudication necessarily carries with it, *per se*, the administration of the affairs and assets of the person adjudicated, except such as are saved by the act absolutely or by limitation of time. Are these assignments in trust *for the benefit of the bankrupt's creditors saved* by the act in either respect?

There is nothing within the provisions of the act saving them. Are they protected, then, either *from the proper construction of the whole act* or *under the general principles of jurisprudence?*

It is admitted that section 35 does not apply, because its provisions take away only from a *preferred creditor*, or *fraudulent* transferee of property, the interest thus acquired from the bankrupt, *within the time limited* by the provisions, either by *payment* of the debt, or by *pledge*, *transfer*, or *assignment*, for the *security* of any debt.

This assignment in trust for the benefit of the creditors comes under neither provision or limitation, and, as has been said by our learned friends, *is not named* in the act, but *is left to the general principles of jurisprudence.*

Whenever an insolvent person undertakes to make a final disposition of his assets for the benefit of all his creditors, he must do it through the bankrupt court, when that Court's functions are called into requisition.

"A *trust* to sell *all* the debtor's property, and divide the cash ratably among his creditors, is an act of bankruptcy."—*Hennon* vs. *Pacific R. R. Co.*, 9 National Bankruptcy Register, 178.

"The United States District Court, sitting in bankruptcy, has full and complete jurisdiction to administer the estate of the bankrupt."—*Allen & Co.* vs. *Montgomery*, 10 Bankruptcy Register, 503.

"Although, by proceedings commenced in a State court, a

co-partnership has been declared dissolved, and *all* of its assets placed in the hands of a *receiver*, this *will not prevent* the co-partnership from being declared bankrupt, and having *all the assets administered, and the property placed in the hands of the receiver distributed in the bankruptcy proceedings.*"—*In re Voonan*, 10 Bankruptcy Register, 331.

A trust in the hands of a receiver is analogous to the trust of assignment for the benefit of creditors. The authority and powers are both derived from the State laws and courts, and operate upon the same persons and property, and for the same interests, and the estate, in one like in the other, is distributed ratably among all the creditors.

"A proceeding in involuntary bankruptcy is substantially a proceeding *in rem*."—*Platt* vs. *Archer*, 9 Blatch. 559.

"The appointment by a State court of a receiver of the property of a debtor for the purpose of paying his debts, defeats and delays the operation of the bankrupt act."—*In re Binninger*, 7 Blatch, 262.

An assignment by a debtor of all his property was made to an assignee in trust for the benefit of his creditors. It was held that the assignee under the State law was liable to the assignee subsequently appointed *under proceedings in bankruptcy, for all the property and proceeds thereof in his hands, and had even no right to deduct any compensation for his own services in executing the trust after the bankruptcy proceedings were commenced.*"—4 National Bankruptcy Reg. 124 (Maine); *In re T. S. Cohen*, 6 National Bankruptcy Reg. 379.

"The United States bankrupt act of March 2, 1867, as soon as it went into operation, *ipso facto* suspended all action arising under State laws."—*Commonwealth* vs. *O'Hara*, 1 National Bankruptcy, Reg. 19; *In re Krogman*, 5 National Bankruptcy, Reg. 116.

"An assignee in bankruptcy represents the rights of the creditors, and each of them, as well as the bankrupts, and may therefore maintain or defend proceedings in regard to the property of the latter, which, on grounds of public policy, or otherwise,

he wonld not be allowed to."—*In re St. Helen's Mill Co.*, National Bankruptcy Reg. 414.

It is the policy of the bankrupt act, say the counsel for plaintiffs in error, not to interfere with any transaction which took place more than six months before the institution of proceedings in bankruptcy, and which limitation of time is reduced by recent amendment to three months.

We say there is no such *general* policy of the law. There is only one *special* provision of the act, section 35, which makes any limitation of time; and that provision applies to *preferences* and positive *frauds* committed by the bankrupt, and contemplates dispositions of property made to *prefer* creditors, by insolvent persons or conveyances, transfers or assignments made by such persons only in payment of his debts *to benefit or prefer one or more creditors*, and not any such dispositions made IN TRUST *for the benefit of all creditors.*

The section can not apply to the latter case, for, according to the admissions of the counsel, *such dispositions* of a debtor's property *are regarded fair and commendable at all times*, and according to their argument, *can at no time be disturbed.* "THEY ARE LEFT TO THE GENERAL PRINCIPLES OF JURISPRUDENCE."

They are committed to the general import, spirit, policy and effect of the whole bankrupt act, and the principles of law that arise thereunder, as well as the general rules of law and equity; and it is this general import and effect of the act, and these ordinary rules of jurisprudence, of law and equity, which were taken into consideration by the Supreme Court of the United States, IN ITS CONSTRUCTION *of the force and effect of bankrupt acts of the United States upon State laws and proceedings of like nature.*

Now, by the statutes of Ohio, the plaintiffs in error were compelled, under the deed of assignment made to them, to give bonds *within ten days* after its date, and in default it became the *duty* of the Probate Court to *remove* them. They could not lawfully act under that deed until they gave such bond, and, at best,

co-partnership has been declared dissolved, and *all* of its assets placed in the hands of a *receiver*, this *will not prevent* the co-partnership from being declared bankrupt, and having *all the assets administered, and the property placed in the hands of the receiver distributed in the bankruptcy proceedings.*"—*In re Voonan*, 10 Bankruptcy Register, 331.

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the deed of assignment was inoperative until the 21st day of January, 1874. We do not care about this fact so much, except to show that this deed of assignment was not the regular and proper deed to become operative, *as far as the plaintiffs in error were concerned*, as that they should here claim such insuperable rights under it, in any event, especially *as to time*. Of course, the construction of the State law in this respect, as the construction of the national law, *is left to the operation of the general* principles of law. If time, however, is not the essence in one case, why should it be in the other? Suppose no bond had been given at all under the deed of assignment *even up to the present time*, the principle would remain unchanged; but the more serious question would arise as to what credit and protection would be given to it by this Court under the general principles of law. What security would the creditors, whom the defendant in error represents in bankruptcy, have for the proper and faithful administration of the whole estate thus imperiled, when, on the other hand, if he had possession of the same, the bankrupt act would require of him a full and ample bond. So far as the filing of the *amended* petition in bankruptcy is concerned, there is no doubt but that, being an *amendment to conform* with the new requirements of the act, *it had reference* to the proceedings *already commenced* by the filing of the *original* petition, and the subsequent *adjudication*, by virtue of the law, related back *to the date of the filing of the petition.*

These *technicalities* suggested by counsel can have no effect, however, *on the existing fact that there has been an adjudication*, and that the appointment and qualification of the defendant in error as assignee in bankruptcy thereunder is not and can not be disputed.

The deed of trust under which the plaintiffs in error claim, as appears by the record, was originally made on the 3d day of December, to them, and one Florence Marmet jointly, and in it Max Hellman was not named, and not until January 21st, following, was this deed of trust and the trust thereby created in them and Max Hellman, *made or accepted*. Nothing was done

under it until that time, for the reason no doubt that the trustees had not accepted the trust until then, as is apparent from the fact that Florence Marmet never qualified at all under it. We contend that this deed of trust *had no effect until the 21st day of January*, and there was no deed of assignment until then, when it was for the first time accepted by the trustees, who then only became qualified and appointed assignees thereunder, in accordance with the laws of Ohio. Without the statute of Ohio this deed of assignment could never have had any legal effect, and it can not be denied but that it was made in the ordinary way, as a deed of assignment for the benefit of creditors, under the insolvent laws of Ohio. It was dependent upon that law, to be of any avail, and had no innate force independent thereof. *It was not a creature of the common law*, but authorized only in Ohio, *by virtue of the statute of Ohio passed April 6*, 1859 (1 Swan & Critchfield, 709), which, upon reference, will show that the act is classified under the general laws respecting "*insolvent debtor*."

We quote from the act, as follows:

"*Be it enacted by the General Assembly of the State of Ohio, that when any person shall make an assignment to a trustee of any property, money, rights or credits,* IN TRUST, FOR THE BENEFIT OF CREDITORS, IT SHALL BE THE DUTY *of said trustee,* WITHIN TEN DAYS *after the delivery of the assignment to him, and before disposing of any property so assigned, to appear before the probate judge, produce the assignment, cause the same to be filed in the probate court, and enter into an undertaking payable to the State of Ohio,*" etc. "*If any assignee as aforesaid, shall not,* WITHIN TEN DAYS *after his* NOMINATION *to such trust, comply with these provisions, it shall be the duty of the probate judge to remove him on application,*" etc.

Now, it is evident that the mere making of the assignment by the debtor is, as the law calls it, only a NOMINATION of the *trustee;* it is not the *election* or *appointment* of the assignee, for that *the law* does. The debtor merely *nominates*, and the Court when the *nominee* accepts and is qualified, as the law provides.

confirms and makes the appointment the nomination. Now, in this case, the debtors *nominated*, on December 3d, the plaintiffs in error together with Florence Marmet, neither of whom accepted, qualified, or were confirmed or appointed until January 21st, and Marmet *never* accepted, and was never confirmed.

The trust was therefore *inoperative*, even under the State laws, until January 21st, and not *until then* did it operate as a trust, under the laws, by virtue of which only it could have any legal effect *at any time.*

The petition in bankruptcy was filed June 22d, *less than five months* after these trustees were elected, and *less than five months after* the assignment became operative.

And now in reference to the date of the commencement of the proceedings in bankruptcy. It is admitted that the petition was filed June 22d, and it must be agreed that the amended petition, which was subsequently filed, was predicated upon the original petition and was filed by leave of Court, which had the discretion so to do, in order that the amendments of June 22d could be complied with by the petitioning creditors. The District Court of the United States acquired jurisdiction under the *original* petition, permitted the amendment thereto, and then rendered the adjudication of bankruptcy. Did not the proceedings then commence with the filing of the petition, June 22d?

The original petition was not amended so as to change its form of character, but the amendment was one made necessary by the passage of the amendatory act, requiring creditors to join in a petition for adjudication, to conform to which the amendment only was made and allowed by the Court. In any event, *there has been an adjudication, and it can not be now impeached collaterally or otherwise.* "The filing of the petition for an adjudication in bankruptcy, either by a debtor on his own behalf, or by *any creditor* against a debtor, shall be *deemed* to be *the commencement* of proceedings in bankruptcy." *Vide* Bankrupt Act. The amendment passed June 22d, permits the Court to grant time to obtain the necessary number of creditors to the original petition, and the Court having done so in this case, and having

adjudicated the debtors bankrupts, neither the permission of the Court nor the adjudication can thus be collaterally impeached. It follows then, that the proceedings in bankruptcy were commenced *within less than five months* after the assignment under the State Court lawfully *commenced to operate*, and even if *time* is the essence of the right of defendant in error in this proceeding, there seems to us no doubt upon this question raised by plaintiffs in error.

But, as we have before intimated, we think *the right and prerogative* of the bankrupt court, *having once acquired jurisdiction over the persons and subject-matter, by the adjudication*, can not be abridged by *time*. There is no *statute of limitations* against the acts of Congress in favor of the laws of the States. This claim, if conceded to be tenable, renders the operation of the bankrupt act, after an adjudication of bankruptcy, completely abortive. The decision of this case depends *upon higher* and *more exalted* principles.

Such a claim is a defiance against the power, wisdom, and justice of the national law.

The debtor is a declared bankrupt; the creditor is subject to its provisions, and yet our learned friends contend that while the bankrupt court has accomplished all this, it can go no further. It may declare the debtor bankrupt, and may require all the creditors to relinquish their claims to the benefit of the law of the State, under which the assignment was originally made, but it can not take with it the estate. The estate must continue in the hands of the State court, must be administered by its officers. Why pronounce the solemn adjudication of bankruptcy, if all the incidents of such do not follow? Are not "*the administration of the bankrupt estate, the collection of all the assets, the ascertainment and liquidation of the liens, the adjustment of the various priorities, the marshaling and distribution of the funds and assets*," ITS GREATEST AND MOST IMPORTANT ATTRIBUTES?

We can, with perfect consistency, and with the authority of the Circuit Court of the United States, which in this case below has supported and confirmed our views, answer the third proposition made by counsel for plaintiff in error.

They ask, "*Does the bankrupt act, for the* HARMONIOUS *action of its provisions, demand that the assignee in bankruptcy should dispossess them?*" And they say this is one of the five questions arising on the record for the determination of this Court.

We thus answer our learned friends: The bankrupt act, for the harmonious action of its provisions, *does* demand this of them. There is a clash of interests in their refusal, and the court in bankruptcy is *utterly powerless* to continue and complete its work. Since the adjudication without the estate, or some portion of it, it could not further proceed. Its officers (except the judge) are not salaried and paid by the government, but must depend, in order to carry out the provisions of the law, upon the means in the estate, which the plaintiffs in error refuse to provide.

We now ask the contrary of their proposition: Does the *assignment act of Ohio*, for "harmonious action of *its* provisions," demand that the plaintiffs in error should retain the estate? Its *province* and *functions* have ended since the debtors were adjudged bankrupt; and its provisions *can not be carried out*, for neither the debtors nor the creditors are further amenable to it, in preference to the provisions of the bankrupt act.

The trust is at an end; it has served its time, and should be yielded up to the higher powers, to be carried out in the spirit of the laws of the nation.

We all know that the assignment and bankrupt laws are of analogous character, but the mode and manner of administration differ in the two systems in some particulars. The assignment laws permit and sanction *preferences* whenever made, while the bankrupt act is a beautiful system of law, the main features of which, in contrast, are that it discharges an honest, unfortunate debtor from his debts, under certain equitable conditions, and provides for the distribution of his property *equally* among his creditors without *preference*.

It mainly differs from the State system, however, in its provision for discharging the debtor, and this brings us to the discussion of the other question raised by the plaintiffs in error—

i. e. whether the State law is "*an insolvent law within the purview of any recognized decision.*"

We will answer this question, although we fail to see its relevancy to the issues in this proceeding, and claim, as we have already said, it does not arise here. Whether the statute of Ohio be properly termed an insolvent law or not, seem to us immaterial. It certainly purports and contemplates the control and disposition of the estate of persons unable to pay their debts, and therefore *insolvent.*

In this case the utter *insolvency* of the debtors when they made the assignment, is conceded; but it is objected that the State law is not an *insolvent* law. What is it then? The law is not intended to carry on a man's business who is *solvent*, and able to pay his debts and continue. If that is the policy of the State law, it might be profitable to carry on the business of many large firms, perfectly solvent, who have no other reason to discontinue, than that they desire to retire from business, and allow the State and its officers to enjoy some of the profits.

The law is an *insolvent* act, because it presumes the debtor unable to pay his debts; but it is not a *bankrupt* act in the strict sense, for it does not purport to *discharge* the debtor from the payment of his debts.

The most important authority on this question, and the one containing the clearest reasoning is the opinion of the Court, Blodgett, J., *In re Merchants Insurance Company*, reported in 6 National Bankruptcy Register, 43.

In that case the *act of bankruptcy* charged, was, that the company had suffered its property to be placed in the hands of a *receiver* for the benefit of its creditors. Such a disposition could not of course *discharge* the *obligation* of its debts, and yet it necessarily is a proceeding to administer an *insolvent's* estate "The receiver of a court of chancery is its executive officer, as much so, to all intents and purposes, as a sheriff of a court of law, except that the *scope* of the receiver's warrant is more comprehensive, he being required to pay *all* debts, while the sheriff seeks *only* the payment of the *specific* debt mentioned in his execution or attachment." 2 N. B. R. 2.

The Court, Blodgett, J., in announcing its opinion in the case, says:

"But it is objected that the proceedings in the *State Court* here complained of, being in accordance with a general statute of the State of Illinois, and the State court having acquired jurisdiction of the parties and subject-matter, *this Court* can not now interfere, *as a bankrupt court, and take charge of and administer the assetts in question*, although the *insolvency* of the respondent is fully conceded.

"It seems enough to suggest, in answer to this position, that *if correct*, ANY STATE COULD EFFECTUALLY DEFEAT THE OPERATION OF ANY BANKRUPT LAW PASSED BY CONGRESS, by simply providing that any person or corporation, if deemed *insolvent* or incapable of doing business, might, under the power of exercising and enforcing police regulations or *enactments by the States* be wound up, and *its assets be administered upon in the State courts* notwithstanding such person or corporation might be *insolvent* and guilty of all the acts of bankruptcy provided for in the general bankrupt law."

"It is further urged," says the Court (Blodgett, J.), "that the proceeding in question does not come *within the terms of the bankrupt act* because the State law under which it is instituted, *is not an insolvent law*, inasmuch as it does not purport to *discharge* the debtors from *their liabilities;* but we fail to perceive how the *treatment* the debtor may receive at the hands of the State court can avail to sustain *that court's control over the assets*." If the fact of *insolvency* exists, and the person or corporation *is within* the provision *of the bankrupt act* (and in this case there is no question on this point, for the *persons* have been *adjudged* bankrupts), the Federal courts sitting in bankruptcy have *exclusive* jurisdiction of his *property* and the fact that a State law does not relieve the debtor from his debts, *can not be urged* as a reason, why the State court should *hold the assets and administer them* after proceedings in bankruptcy have been instituted in the *Federal courts*."

But the Court goes further, and squarely decides *the question*

itself as raised by plaintiffs in error: "IT SEEMS CLEAR TO US THAT IN SO FAR AS A STATE LAW ATTEMPTS TO ADMINISTER ON THE EFFECTS OF AN INSOLVENT DEBTOR AND DISTRIBUTE THEM AMONG HIS CREDITORS, IT IS TO ALL INTENTS AND PURPOSES AN INSOLVENT LAW, ALTHOUGH IT MAY NOT AUTHORIZE A DISCHARGE OF THE DEBTOR FROM FURTHER LIABILITY." "And when insolvency exists so as to make *the debtor a proper subject* for the operation of the bankrupt act, the *exclusive* jurisdiction of the bankrupt court *attaches*, and the State court, *and those acting under its mandate*, MUST SURRENDER THE CONTROL OF THE ASSETS.

"This is not a case of concurrent jurisdiction between the State and Federal courts, inasmuch as the bankrupt court has *exclusive* jurisdiction."

Now, this case is directly in point, not only as decisive of the question of whether the assignment law of Ohio for the benefit of creditors is an *insolvent* act, but also of the higher and main proposition involved in this proceeding.

It follows the authority of Chief Justice Marshall, in *Sturges* vs. *Crowninshield*, and Justice Story, in *Ex parte Lucius Eames*.

It is the only proper construction that can be given to the bankrupt act in its operation on the laws of the States, which design to control and administer the estates of insolvents who have been *adjudged* bankrupts by the Federal courts. Otherwise it would have been improper and fruitless for the District Court of the United States to have assumed jurisdiction over the insolvent Bogens, and have adjudged them bankrupts, if that court can not continue its jurisdiction and *carry out all* the provisions of the law under which its jurisdiction was acquired.

But our learned friends admit that the Bogens were "*largely insolvent*" when the assignment was made. They say so on the very first page of their brief, and yet they intimate that the assignment law of Ohio is not an *insolvent* law. It certainly is, at least, within the true *meaning* and *intent* of the bankrupt act, irrespective of what Webster's definition of the term insolvency is.

By *insolvency*, as used in the provisions of the bankrupt act when applied to traders and merchants, is meant *their inability*

to pay their debts as they become due in the ordinary course of their business.

This is the *legal* definition, and has been the universal construction of the term by the Federal courts. *In re Goldschmidt* 3 B. R. 165; *In re Freeman*, 4 B. R. 64; *In re Lutgens*, 7 Pac L. R. 89; *In re Alonzo Pearce*, 21 Vt. 611; *In re Brodhead*, B. R. 278; *Smith* vs. *Ely*, 1 N. Y. Leg. Obs. 343; *Sawyer* vs *Turpin*, 5 B. R. 339; *In re Walton et al.*, Deady, 442; S. C. Wall. 584.

In the case of *Ogden* vs. *Sanders*, 12 Wheat. 213, this Court over which Chief Justice Marshall then presided, declared "that every bankrupt or *insolvent system* in the world must partake of the character of a *judicial* investigation. Parties whose rights are to be affected, are entitled to a hearing. Hence every system in common with the *particular* system now before us, professes to *summon* the creditors before its tribunal."

Now we are inclined to the belief that the Federal courts, in their construction that an assignment for the benefit of creditors under the State laws *is an act of bankruptcy* did not go upon the presumption that such assignments were prohibited by the 35th or 39th sections, or that they were (as the plaintiffs in error themselves admit is not the fact) referred to, or named in said sections or in the act; but they went in their decisions upon the ground that these assignment laws were *insolvent* laws purporting to administer the *insolvent's* estate, and therefore proposing to do just what the bankrupt act, when enforced, contemplates and is designed to do in its own *peculiar* and *preroga-tive* manner. It is therefore that *time* is not essential to determine this right, for when a court in bankruptcy has rendered an adjudication and appointed an assignee who is an officer of that court, it will permit no obstacle in the way of completely carrying out *all* its provisions, not only in so far as it operated on the *persons*, but as well on the *property*, and this was the view taken by the Circuit Court below, sustaining the defendant in error.

Counsel for plaintiffs in error admit that State *bankrupt* laws are *ipso facto* suspended by the *force and effect* of the bankrupt act, in their argument, on page 20 of their brief.

There is, however, no such thing known to the State laws as a *State bankrupt law*, as such.

A law of the State, which would discharge the debtor absolutely, as a *bankrupt*, as the bankrupt act of the United States may discharge him, would be a law *impairing the obligation* of contracts, and would be in direct contravention of the Constitution of the United States. "No State shall pass a law impairing the obligation of contracts," is one of the provisions of the Constitution, and this right was especially reserved to Congress.

All State laws, therefore, purporting to administer an insolvent's estate are restrained from embodying this *prohibited* element, and it follows that such laws can only properly be termed *insolvent laws*, and therefore must come within the purview of the decisions of this Court, heretofore referred to, and are subject to the construction so made by Chief Justice Marshall. The insolvent law of 1831, of Ohio, referred to by our learned friends, is an act affording an insolvent debtor relief from *imprisonment* only, but that act is distinct from the other law of 1859.

It must be understood that THE DEBTS, from which the insolvent act of Ohio, of 1831, relieves the debtor from imprisonment, *are not civil debts*. They are what are known as debts incurred under *quasi criminal* proceedings. Thanks to our modern jurisprudence, *imprisonment for civil debt* is unknown to the laws of our State, or of the age, and indeed the act of 1831 has become a dead letter itself.

The debts from which the act of 1831 relieve the debtor from imprisonment, are judgments in bastardy fines, penalties and like cases, partaking of a criminal nature, and the humanity of the law of 1831, even in such cases, affords relief where the person *has no property* to surrender, or has surrendered what he has. The act of 1831, therefore, can not be relied on by plaintiffs in error as the measure of distinguishing the two systems of Ohio, and as contradistinguishing the one from the other as an *insolvent law*. *They are both insolvent laws, however*—the one designing to administer the estate of an insolvent, who has *not sufficient property* to pay his debts; the other to relieve an in-

solvent *from imprisonment* who *has nothing* or not sufficient to pay with, but both are insolvent laws.

We see no escape for our learned friends in the manner they are endeavoring thus to show their alleged right to hold on to the estate of the bankrupts. The comparison of these two acts of Ohio, by them, is a concession of the weakness of their claim. The debts of the Bogens are civil debts, incurred as traders and merchants, and being insolvent, they could not pay, and in order to wind up their affairs, they made the assignment to plaintiffs in error ; but the bankrupt law has now taken hold of them and their affairs, and proposes to wind up their affairs according to its forms and provisions, and for that purpose has appointed the defendant in error, as its officer, to assist.

The plaintiffs in error would have the Court believe their resistance to the assignee in bankruptcy is not for any private aggrandizement, and not because they have any objection to the bankrupt act. Certainly not, for they as creditors proved their claims in bankruptcy, expecting, no doubt, to swell the number of votes which they could control to be elected assignees in bankruptcy themselves. But they were defeated, and therein exists the trouble. The great majority of the creditors preferred to have the defendant in error possess and manage the estate.

And now this Court is asked to continue the possession and administration of the estate in the hands of the plaintiffs in error; and we would inquire, *for whose benefit?* Under the meaning of the the bankrupt act, it not in fact, *all* the creditors, as well as the bankrupts, are opposed to such a conclusion, as is the very nature and import of the bankrupt act and system itself, the powers of which will be usurped by the State laws and system if such claims can be recognized.

We apprehend that this Court will not bring about such a situation, and permit the plaintiffs in error to continue a trust which has ceased to exist, or allow the functions of the "uniform system of bankruptcy of the United States" to be surrendered to the limited administration of the assignment laws of the State, but will agree with the Circuit Court below, confirm its decision, and vindicate the authority of the bankrupt courts of the United States.

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